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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 433

CITY OF POTTSVILLE, *Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal from the United States District Court for the Middle District of Pennsylvania

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant City of Pottsville appeals from the order of the United States District Court for the Middle District of Pennsylvania, entered on July 11, 1967, denying appellant's motion pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, for leave to intervene in proceedings brought to permanently enjoin the enforcement, operation and execution of certain

orders of the Interstate Commerce Commission, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

A copy of the July 11, 1967 order of the three-judge United States District Court for the Middle District of Pennsylvania is attached hereto as Appendix A. The opinion of July 13, 1967 is attached hereto as Appendix B. Notice of Appeal was filed in said court on July 27, 1967.

JURISDICTION

A suit was brought by the Borough of Moosic under Title 28, United States Code, Sections 1336, 1398, 2284 and 2321-25, to annul and set aside the orders of the Interstate Commerce Commission in two proceedings held by that agency. These were (1) *Pennsylvania R. Co.-Merger-New York Central R. Co.,* 327 I.C.C. 475, 328 I.C.C. 304 and 330 I.C.C. 328, and (2) *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger* (not yet reported), both orders dated June 9, 1967 permitting and directing certain transactions on July 17, 1967.

City of Pottsville moved for leave to intervene on June 27, 1967 pursuant to 28 U.S.C. Section 2323 and Rule 24(a) of the Federal Rules of Civil Procedure. The order of the District Court denying the motion for leave to intervene was entered on July 11, 1967.

This court has jurisdiction to review said order on direct appeal under 28 United States Code Section 1253. Jurisdiction is sustained by *Brotherhood of Railroad Trainmen* v. *B. & O. R. Co.,* 331 U.S. 519, 524-25, 531; *Sutphen Estates* v. *United States,* 342 U.S. 19, 20.

QUESTION PRESENTED

May a municipality not a resident of the judicial district in which an action is brought to set aside orders of the Interstate Commerce Commission, upon objection of the United States and intervenor Interstate Commerce Commission, be denied leave to intervene as a party plaintiff even though such municipality was a party to one of the Interstate Commerce Commission proceedings whose order is attacked in the action by the plaintiff?

STATUTES INVOLVED

The statutes involved in this appeal are Judicial Code, 28 U.S.C. Sections 2323 and 1253, and are reproduced herein in Appendix C. Rule 24(a) of the Federal Rules of Civil Procedure is also included in Appendix C.

STATEMENT

This is an appeal from an order of the United States District Court for the Middle District of Pennsylvania denying the motion of City of Pottsville pursuant to Rule 24(a) of the Federal Rules of Civil Procedure for leave to intervene as a party plaintiff in a proceeding brought by Moosic, Pa. to set aside orders of the Interstate Commerce Commission which (1) approved and permitted the merger of The Pennsylvania Railroad Company and The New York Central Railroad Company and (2) directed Norfolk and Western Railway Company to include in its system Erie-Lackawanna Railroad Company, The Delaware and Hudson Railroad Corporation and Boston and Maine Corporation.

City of Pottsville was a party to the Interstate Commerce Commission proceedings involving the merger

of The Pennsylvania Railroad Company and The New York Central Railroad Company. Its motion was denied on the ground that City of Pottsville is not located in the Middle District of Pennsylvania and that the United States of America and the Interstate Commerce Commission having objecting to parties raising their objection to both I.C.C. proceedings other than in the Southern District of New York.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is whether the unqualified right of intervention accorded by 28 U.S.C. Section 2323 and Rule 24(a) of the Federal Rules of Civil Procedure can be defeated by the desire of the United States and Interstate Commerce Commission to force appellant to bring its suit in the Southern District of New York.

This question is important to the administration of the judicial review of orders of the Interstate Commerce Commission. It is also important for the determination of the right of smaller communities to participate in judicial review of Interstate Commerce Commission orders. One effect of the District Court's action is to deny appellant's request for a permanent injunction against the Interstate Commerce Commission orders.

The District Court Erred in Denying Pottsville's Motion for Leave to Intervene

The District Court granted the motion of Milton J. Shapp, a resident of the Eastern District of Pennsylvania, for leave to intervene. The denial of Pottsville's similar motion deprived appellant of the right to challenge orders of the Interstate Commerce Commission

as an intervenor to a suit brought by another community. City of Pottsville should not be required to go to the financial center of the country to attempt intervention in the suit of a railroad, since it has a statutory right under 28 U.S.C. Section 2323 to intervene in the suit instituted by Moosic, Pa., a community located in nearby Lackawanna County.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 10054 Civil

BOROUGH OF MOOSIC, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

Order Allowing Intervention of the City of Scranton as a Party Plaintiff, and Denying Intervention of the City of Pottsville as a Party Plaintiff.

This cause coming on to be heard on the motion of the City of Scranton and the City of Pottsville for leave to intervene as parties plaintiff, and the court having considered said motion and the complaint tendered therewith, and it appearing to the court that the said City of Scranton should be permitted to intervene, as prayed, and the court being duly advised in the premises,

It is ORDERED that the City of Scranton has leave to intervene in this cause, and is hereby made a party to this cause, and to that end said intervenors' complaint, insofar as it is applicable to the City of Scranton, be deemed filed, all to the end that said party may participate herein in the same manner and in like effect as if an original plaintiff; and

It further appearing that the City of Pottsville is not located in this district, and the United States of America and the Interstate Commerce Commission having objecting to parties raising their objections to these I.C.C. proceedings other than in the Southern District of New York,

It is further ORDERED that the application of the City of Pottsville to intervene as a party plaintiff is denied.

/s/ MICHAEL H. SHERIDAN
United States District Judge

Dated: July 11, 1967.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 10054

BOROUGH OF MOOSIC, *Plaintiff*,

MILTON J. SHAPP and CITY OF SCRANTON, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, NEW YORK CENTRAL RAILROAD COMPANY, and PENNSYLVANIA RAILROAD COMPANY, *Intervening Defendants.*

Before: Van Dusen, Circuit Judge, and Sheridan and Nealson, District Judges

Memorandum Sur Motions of Defendant and Intervening Defendants for a Stay

PER CURIAM July 13, 1967

This action seeks to enjoin permanently, set aside and annul these June 9, 1967 (served June 12) Orders of the Interstate Commerce Commission under 28 U.S.C. § 1336:

A. Pennsylvania Railroad Company-New York Central Company Merger 21989-90 (hereinafter I. C. C. Penn-Central merger proceedings)—see Appendix 1 to Complaint.

B. Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Finance Docket

21510 et al. (hereinafter I. C. C. N & W-Nickel Plate merger proceeding)—see Appendix 2 to the Complaint.[1]

This case is now before the court on motions of defendant and intervening defendants for a stay of all proceedings. The background of the I. C. C. proceedings and court cases leading up to the application for a stay of proceedings is summarized in *Erie Lackawanna Railroad Co.* v. *United States,* 259 F. Supp. 964 (S. D. N. Y. 1966); *B. & O. R. Co.* v. *United States,* 386 U.S. 372 (1967); *Erie-Lackawanna Railroad Company* v. *United States of America et al.,* ... F. Supp. ... (S. D. N. Y. 66 Civ. 2860, 2903 & 2914, Memorandum Order of 7/3/67).[2] On the morning of July 7, 1967, the I. C. C. postponed the effective date of the inclusion order covering the Erie-Lackawanna Railroad Company (E-L), Delaware and Hudson Railroad Company (D & H), and the Boston and Maine Corporation (B & M) in the I. C. C. N & W-Nickel Plate merger proceeding pending its decision on petitions for reconsideration of the June inclusion order in the N & W-Nickel Plate merger proceedings by B & M and D & H.

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[1] An order of the I. C. C. permitting the Chesapeake & Ohio Railway Co. (C & O) to control the Baltimore and Ohio Railroad Company (B & O), which "owns 38% of the voting control of the Reading Company which in turn controls" Central Railroad of New Jersey (see 386 U. S. 372, at 383), was sustained in *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (E. D. Mich. 1963), aff'd. 375 U. S. 216 (1963). The C & O-B & O systems seek to merge with the N & W system into a single system, which has offered "to include" E-L, D & H, B & M, The Reading Company and CNJ "therein subject to various conditions" (see 386 U. S. 372 at 384).

[2] Related proceedings pending in the U. S. District Court for the Southern District of New York are Erie-Lackawanna Railroad Co. v. United States and Norfolk and Western Railway Co., No. 67 Civ. 2362, and Delaware and Hudson and Boston and Maine v. United States, No. 67 Civ. 2451.

These mergers have been considered by the I. C. C. as incident to what the Supreme Court of the United States has described as "the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States,* 356 U.S. 412, 417-8 (1958), which was quoted with approval in *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 387 (1967).

The Supreme Court of the United States has emphasized the need for expedition of all litigation challenging the Penn-Central merger, using this language in *B. & O. R. Co.* v. *United States,* supra, at 392:

> "The Penn-Central merger has been studied for a decade. Indeed, the parties to the merger agreed to it over five years ago and it has been under Commission consideration ever since that time. This is, of course, the more reason for expedition. We note and give weight to the estimates of the Commission that the inclusion proceedings of the three roads in the N & W should be concluded in 'a relatively short time.' Our remand should, therefore, entail only a very short delay before the Commission. If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made."

At the hearing on the above Motion on July 7, the United States and the Interstate Commerce Commission stipulated of record that as defendants in the above-mentioned civil atcions pending in the United States District Court for the Southern District of New York, they would make no objection to, and would welcome, the intervention of plaintiff in this action as an intervening plaintiff there prior to the July 17 deadline established by that court in its July 3 Memorandum Order and that, in the interests of prompt dispatch of the important federal judicial litigation, which is involved in this case, plaintiff's complaint

should be considered by the above-mentioned New York Federal Court. Trial counsel for the City of Scranton and Mr. Shapp, who have been active intervenors in the New York Federal Court since the inception of 66 Civ. 2860, is also one of counsel for plaintiff. An examination of the complaint filed in this action (VIII A on pages 5-10) discloses that it is virtually identical with the complaint of such intervening plaintiffs in 66 Civ. 2860 insofar as such complaints attack the Penn-Central merger. Subsections y-bb (four subparagraphs) of this Complaint, which are not in the Complaint in 66 Civ. 2860, challenge inclusion of the New Haven Railroad in the merger and the failure to consider reported earnings of Penn-Central for the first three months of 1967. No reason has been shown why these matters cannot be raised in 66 Civ. 2860 before July 17.

Also, many of the issues covered by this complaint may be covered by the scheduled final hearing to be held before the New York Federal Court on September 18, 1967. In the Memorandum Order of July 3, 1967, this language appears:

> "The Supreme Court made it clear that the issues of 'the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties,' *ibid.*, remained for final determination in this actions . . . If the actions remain pending for the grant of relief which the N & W and its allies want, especially for what, as will hereafter appear, we consider relief that may go beyond the Supreme Court's mandate, they are pending for other purposes as well.
>
> • • •
>
> "Each plaintiff or intervening plaintiff in such actions shall file and serve on or before July 17, 1967 a supplemental complaint setting forth in what respects it ob-

jects to the order in F. D. No. 21989 as this now stands and *what further relief it seeks.* [Emphasis supplied.]

It is not clear exactly how many issues challenged by the attack made in VIII B and C (pages 10-12) of this complaint will be considered at the New York Federal Court's final hearing on September 18. However, the above-quoted language from the July 3 Memorandum Order makes it likely that most, if not all, of them will be so considered if they are raised in supplemental complaints or an intervening complaint filed by the plaintiff on or before July 17.[3] An application to modify the stay of proceedings in this case may be made, if appropriate, after August 8, when the supplemental complaints and briefs of the moving parties have been filed in the New York Federal Court cases. Also, it is noted that the basic attack in this complaint is on the Penn-Central merger and plaintiff contends the railroads in its Borough (E-L and D & H) were forced to apply to participate in the N & W merger by the Penn-Central merger proposal.

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[3] In footnote 9 on page 949 of *New York Central Railroad Company* v. *United States,* 200 F. Supp. 944 (S. D. N. Y. 1961), it is noted that Professor Moore believes that an intervenor's complaint may expand the issues presented by the original plaintiff, even though that court reached a different conclusion on the facts of that case. It may be that avoidance of a multiplicity of suits concerning these two larger mergers will justify requiring a party such as this plaintiff to intervene, both in the New York Federal Court as well as in the Virginia Federal Court (Norfolk and Western Ry. Co. v. United States, C. A. 67-C-51-R in W. D. of Va.—Roanoke Div.), since the actions in both those courts, which are more convenient to the litigants who produced most of the documents and records in the administrative proceedings being attacked, were instituted prior to this action. If parties such as plaintiff are required to litigate their challenges to administrative orders affecting large numbers of persons over large areas in one or two centrally located courts, it would seem likely that Professor Moore's rule would be applied at least in such cases. In any event, it may well be necessary to limit this action to matters which are not permitted to be raised in the New York Federal Court.

The venue language of 28 U.S.C. § 1398 does not preclude the granting of a stay in a proceeding to enjoin an order of the I.C.C. in view of this language of the Supreme Court of the *United States in Kansas City Southern Ry.* v. *United States,* 282 U.S. 760, 763-4 (1931):

> "The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, *to the end that there may not be a multiplicity of suits without substantial reason.* . . . [Emphasis added.]

Both the Supreme Court of the United States and the United States Court of Appeals for the Third Circuit have stated that the rule that "the court which first has possession of the subject must decide it" is "salutary." See *Smith* v. *McIver,* 22 U.S. 532, 535 (1824); *Crosley Corporation* v. *Hazeltine Corporation,* 122 F. 2d 925, 929-930 (3rd Cir. 1941). In the latter case, Judge Maris used this language at page 930:

> "It is of obvious importance to all litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. . . . The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy.

> Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

Cf. *Popkin* v. *Eastern Airlines, Inc.*, 204 F. Supp. 426, 432-3 (E. D. Pa. 1962). See, also, authorities cited at pages 16-18 of defendant's Memorandum attached to its Motion To Stay Further Proceedings. In footnote 3 of the Memorandum Order of July 3, 1967, the New York Federal Court pointed out:

> "3. Once we entertained E-L's suit to enjoin the merger, actions in other districts seeking the same relief might well have been stayed by those courts on the United States' stipulating not to contest venue here. See Kansas City Southern Ry. v. United States, 282 U.S. 760, 763-64 (1931); New York Central R. R. v. United States, 200 F. Supp. 944, 950-51 (S.D.N.Y. 1961)."

For the foregoing reasons, a stay of all proceedings will be granted at this time until October 1, 1967 (approximately two weeks after the September 18 final hearing date) or further order of this court, with leave granted to any party or amicus curiae to apply for modification of such stay if future circumstances justify such application.

It is not necessary to rule at this time on defendant's suggestion that the stay provide that plaintiff's and intervenor-plaintiffs' complaints will be dismissed with prejudice if they do not seek to intervene or file supplemental complaints in the above New York Federal Court litigation.

Plaintiff and defendant are requested to give the court a report on the status of other litigation concerning the I. C. C. orders attacked in this case and of all court litigation concerning them no later than September 5, 1967.

In view of the terms of 28 U.S.C. § 2323 and the statements in the record showing that the following are parties

to the relevant I. C. C. proceedings, they have been permitted to intervene in this proceeding:

Milton J. Shapp, as a party plaintiff

City of Scranton, as a party plaintiff

New York Central Railroad Company, as a party defendant

Pennsylvania Railroad Company, as a party defendant

Interstate Commerce Commission, as a party defendant

However, all parties must recognize that the above-mentioned litigation was commenced in the New York and Virginia (footnote 3) Federal Courts before the institution of this suit and their rights may be affected if they do not seek to intervene promptly in one or both of those proceedings. Also, additional consequences may be applicable to Mr. Shapp and the City of Scranton if they fail to press their claims in the New York Federal Court since they have been parties to that proceeding for almost a year.

Since the City of Pottsville is not located in this District (28 U.S.C. § 1398) and the defendant has objected to parties raising their objections to these I. C. C. Orders other than in the Southern District of New York, its application to intervene must be denied.

The application of the City of Philadelphia cannot be granted until it files and serves a copy of its proposed Answer to be attached to its Motion. See F. R. Civ. P. 24(c).

FRANCIS L. VAN DUSEN, C. J.
MICHAEL H. SHERIDAN, J.
WILLIAM J. NEALSON

July 13, 1967

APPENDIX C

Judiciary Act. Title 28, United States Code:

Section 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23 and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

Section 1253

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Federal Rules of Civil Procedure

Rule 24(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in any action: (1) when a statute of the United States confers an unconditional right to intervene; . . .

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v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

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CITY OF POTTSVILLE, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

This is an appeal from an order denying an application by appellant, City of Pottsville, for leave to intervene as a plaintiff in *Borough of Moosic* v. *United States, et al.*, Civil Action No. 10054, now pending in the United States District Court for the Middle District of Pennsylvania. Appellant is a municipal corporation located in Schuylkill County, Pennsylvania. The original plaintiff, the Borough of Moosic, located in Lackawanna County, Pennsylvania, is seeking to annul and set aside the orders of the Interstate Commerce Commission (a) authorizing merger of the Pennsylvania Railroad Company and

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the New York Central Railroad Company ("Penn-Central")[1] and (b) requiring the inclusion of the Erie-Lackawanna Railroad Company, the Delaware & Hudson Railroad Company and the Boston and Maine Corporation in the Norfolk and Western system ("The *Inclusion* Case").[2] The two orders by the Commission relate to the remand by this Court, last term, of *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372, in which the Court ordered the Commission not to permit the Penn-Central merger to be consummated until the future of the Erie-Lackawanna, the Delaware & Hudson, and the Boston and Maine railroads was determined (see *id.* at 378 and 390). Neither the United States nor the Interstate Commerce Commission expressly opposed appellant's intervention in the court below.[3] It was denied intervention by the court on the ground that "the city of Pottsville is not located in this District (28 U.S.C. § 1398) and the defendant has objected to parties raising their objections to these I.C.C. Orders other than in the Southern District of New York * * *" (J.S. App., p. 9a).

The action below was commenced on June 26, 1967, more than nine months following the commencement of

[1] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 330 I.C.C. 328 (June 9, 1967).

[2] *Norfolk & Western Ry. Co. and New York, Chicago & St. Louis R. Co.—Merger, etc.*, Finance Docket No. 21510, decided June 9, 1967.

[3] Appellant was a party in interest in the Penn-Central merger proceedings before the Commission (J.S., pp. 3–4) and under 28 U.S.C. 2323 would be entitled to intervene in any judicial action seeking to set aside the Commission's order in that case.

the original *Penn-Central* action in the Southern District of New York.[4] In the belief that judicial review of the June 9 Commission orders will be expedited by litigating all challenges to those orders in a single forum, the United States and the Commission have urged all parties to present any claims against these orders in the Southern District of New York.[5] To that end we have moved in the court below to stay further proceedings in the *Moosic* case until further order of that court.[6] The New York court has presently pending before it two actions, the original *Penn-Central* case, *Erie-Lackawanna R. Co.* v. *United States,* 66 Civ. 2860, 66 Civ. 2903, 66 Civ. 2914, S.D.N.Y.,[7] and a suit challenging the *Inclusion* order, *Delaware & Hudson R. Corp.* v. *United States,* 67 Civ. 2451, S.D.N.Y. The three-judge court below, on July 13, 1967, stayed its proceedings until October 1, 1967, by which time both the *Penn-Central* and the

[4] *Erie-Lackawanna* v. *United States*, 259 F. Supp. 964 (S.D.N.Y.), reversed *sub nom. Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372.

[5] The United States and the Commission have stipulated in open court in the Southern District of New York that no objection to venue will be interposed against any party litigating in that forum.

[6] A similar motion was filed in *Norfolk & Western Ry. Co.* v. *United States*, No. 67-C-51-R, W.D. Va., an action filed on June 13, 1967, by the Norfolk & Western railroad challenging the *Inclusion* order.

[7] This is the consolidated action originally filed on September 8, 1966, which this Court remanded to the district court on March 27, 1967. *Baltimore & Ohio R. Co.* v. *United States*, *supra*, n. 4.

Inclusion cases will have been heard in New York (J.S. App., p. 8a).[8]

Appellant applied for leave to intervene in the court below on June 27, 1967. Its attack on the two Commission orders is identical to those of plaintiff and intervening plaintiffs in the action below.[9] Although appellant is not a party to the proceedings in New York, the three-judge court there granted it leave to intervene in the pending New York actions by August 2, 1967.[10] It has not done so.

As the court below observed, the complaint in the *Moosic* case "is virtually identical with the complaint of [Milton J. Shapp and the City of Scranton] intervening plaintiffs in [*Erie-Lackawanna* v. *United*

[8] Final hearings are now set before the same three-judge panel in the Southern District of New York for September 18, 1967, in *Erie-Lackawanna* v. *United States*, *supra*, and for September 28, 1967, in *Delaware & Hudson* v. *United States*, 67 Civ. 2451, S.D.N.Y., the *Inclusion* case in which Boston & Maine and Erie-Lackawanna have intervened and Norfolk & Western has been joined under Fed. R. Civ. P. 19(a).

The Virginia court in *Norfolk & Western* v. *United States*, *supra*, n. 6, expressed the view that Norfolk & Western's attack against the *Inclusion* order should be heard by the New York court because of its close relationship to the Penn-Central merger case. The case has been temporarily stayed and further proceedings to determine the duration of the stay are now pending.

[9] Appellant's proposed complaint was jointly submitted with the City of Scranton, intervening plaintiff below, and incorporates by reference all the pertinent allegations in the complaint filed by plaintiff Borough of Moosic.

[10] See Memorandum on Motions of Trustees of Central Railroad of New Jersey, Boston & Maine Corporation, and City of Scranton and Milton J. Shapp, *Erie-Lackawanna R. Co.* v. *United States*, *supra*, S.D.N.Y., decided July 26, 1967.

States] 66 Civ. 2860 [11] insofar as such complaints attack the Penn-Central merger." (J.S. App., p. 5a.) Other matters raised in ***Moosic,*** as the court below observed, can also be raised in the New York case (*Ibid.*) Furthermore, the attack on the *Inclusion* order in the *Moosic* case is directly grounded on the relationship between the Penn-Central merger and the need for protection of the Erie-Lackawanna and the Delaware & Hudson railroads.[12]

The United States and the Commission believe that all questions relating to the Penn-Central merger should be be heard in the Southern District of New York where the original action to set aside the Commission's approval of that merger began, and that in view of this Court's decision in *Baltimore & Ohio R. Co.* v. *United States, supra,* the *Inclusion* case should be heard there as well. To this end, the proceedings below should be stayed while the actions in New York go forward. However, subject to this condition, we have no objection to appellant's intervention in the court below.

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[11] In staying its own proceedings while the earlier-filed case in New York raising virtually the same issues proceeded to final determination, the district court correctly applied the principle that "the court which first has possession of the subject must decide it." *Smith* v. *M'Iver*, 9 Wheat. 532, 535. See, also, *Kansas City Southern Ry.* v. *United States*, 282 U.S. 760; *Crosley Corp.* v. *Hazeltine Corp.*, 122 F. 2d 925, 929–930 (C.A. 3).

[12] The third protected railroad, the Boston & Maine, does not operate in the Commonwealth of Pennsylvania. According to appellant's proposed complaint in intervention, the City of Pottsville is served by the Reading Company and the Pennsylvania Railroad Company.

The lower court evidently believed that the opposition of the United States and the Commission to the presentation of claims against the Commission's merger and inclusion orders in any court other than the Southern District of New York constituted an objection to appellant's formally becoming a party in the *Moosic* case. This is not the case. Since the parties are not in dispute as to appellant's formal right to participate in the action below, we suggest that the order of the district court denying appellant's application for leave to intervene be vacated and that the case be remanded to that court where appellant would then be afforded an opportunity to renew its application for intervention.[13]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

AUGUST 1967.

[13] The United States and the Commission have proposed that appellant renew its application for intervention in the district court. We shall interpose no objection to such application. Letters to appellant's counsel setting forth this proposal are included in the Appendix.

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE,
Washington, D.C. 20530,
August 21, 1967.

[SEAL]
Address Reply to the
Division Indicated
and Refer to Initials and Number
EMZ: HES
59-12-1376

GORDON P. MACDOUGALL, Esquire
705 Ring Building,
Washington, D.C. 20036

Re: *City of Pottsville* v. *United States,* No. 433; *Borough of Moosic* v. *United States,* No. 10054 (M.D. Pa.)

DEAR MR. MACDOUGALL: This will acknowledge receipt of the Jurisdictional Statement you filed on behalf of the appellant in No. 433, *City of Pottsville* v. *United States.*

While adhering to its view that challenges to the orders of the Interstate Commerce Commission authorizing consummation of the Penn-Central merger and directing the inclusion of the Erie-Lackawanna, Delaware & Hudson, and Boston & Maine railroads in the Norfolk & Western system should be raised in the pending actions in the United States District Court for the Southern District of New York, the United States has no objection to the City of Pottsville formally becoming a party to the *Moosic* case now pending in the United States District Court for the Middle District of Pennsylvania by way of intervention. We also adhere to our view, however, that

the *Borough of Moosic* case should be stayed pending disposition of the proceedings in New York.

In order to facilitate resolution of this matter and to avoid unnecessary imposition on the time of the Supreme Court of the United States, the City of Pottsville might consider withdrawing the Notice of Appeal filed in the district court with a simultaneous renewal of its application for leave to intervene. The United States will interpose no objection to the granting of that motion. The appeal can then be dismissed under Rule 60(1) of the Supreme Court Rules.

Sincerely yours,

EDWIN M. ZIMMERMAN,
Acting Assistant Attorney General,
Antitrust Division.

By: HOWARD E. SHAPIRO,
Acting Chief,
Appellate Section.

cc: All parties

APPENDIX B

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., 20423, August 11, 1967.
FRK:ch

REGISTERED MAIL
GORDON P. MACDOUGALL, Esq.
705 Ring Building,
Washington, D.C., 20036

Re: *Borough of Moosic* v. *United States,* C.A. No. 10054 (M.D. Pa.) (G.C. File No. 2267)

DEAR MR. MACDOUGALL: This is to acknowledge receipt of the Jurisdictional Statement of the City of Pottsville filed on or about July 31, 1967, in the Supreme Court of the United States. We, of course, anticipate filing a response to that pleading.

It occurs to us, however, that the matter of the intervention of the City of Pottsville in the subject case might better be handled by its again petitioning the district court for leave to intervene, rather than by its appealing to the Supreme Court, with the attendant imposition upon the time and facilities of that court. If the City of Pottsville were to seek intervention in the district court, we, of course, would not oppose its application.

Very truly yours,

FRITZ R. KAHN,
Associate General Counsel.

cc: All parties

U.S. GOVERNMENT PRINTING OFFICE: 1967

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 433

CITY OF POTTSVILLE,

Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

RESPONSE OF APPELLANT TO MEMORANDUM BY UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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September, 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 433

CITY OF POTTSVILLE,

Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

---

RESPONSE OF APPELLANT TO MEMORANDUM BY UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

This response is submitted in answer to the memorandum of the United States of America and Interstate Commerce Commission suggesting that the order of the

district court be vacated and the case be remanded to that court, but conditioning its suggestion with "the proceedings below should be stayed while the actions in the Southern District of New York go forward." The conditional suggestion of the U.S. and I.C.C. is not acceptable since it would afford appellant no real relief and still presents the issue of the stay to compel the appellant to resort to the New York court, which is one of the two reasons for the denial of the intervention (J.S. App. B, p. 9a). Thus the underlying question before the Court is whether the appellant can only proceed in another forum where two separate actions are going on, notwithstanding the basic position of the appellant of its right to proceed in a forum in its State to attack the inextricably intertwined I.C.C. orders in one action.

For the reasons just stated, other parties to the district court proceeding in Pennsylvania have applied for mandamus or certiorari in this Court on September 15, 1967 in Nos. 663 and 664 Misc. to review the failure of the district court to proceed with judicial review of the two I.C.C. orders in one proceeding. Nine copies of the pertinent documents already filed with the Court in those proceedings are being lodged with the filing of this response.

Appellant respectfully suggests that the order of the court below denying intervention be reversed and that the court below be directed to allow intervention and to

hear and determine the appellant's attacks in its action against the two disputed I.C.C. orders.

Respectfully submitted,

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Attorney for Appellant

Of Counsel:

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September, 1967

FILE COPY

RECORD NOT PRINTED

No. 778

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JOHN F. DAVIS, CL

Supreme Court of the United States

October Term, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants

v.

UNITED STATES OF AMERICA, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of New York

---

JURISDICTIONAL STATEMENT

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Section 5(1) 4

Section 5(2) 3, 4

Section 5(9) 4

Supreme Court of the United States

October Term, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants

v.

UNITED STATES OF AMERICA, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of New York

---

JURISDICTIONAL STATEMENT

The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, and Western Maryland Railway Company, appeal from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellants' complaint seeking to enjoin the enforcement of an order of the Interstate Commerce Commission, dated June 9, 1967, which permitted immediate consummation of the Penn-Central merger, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The three-judge United States District Court for the Southern District of New York issued two opinions,

dated July 3, 1967, and October 19, 1967, respectively, neither of which is yet reported. The opinion of July 3, 1967, dealt principally with procedural aspects of the case and is reprinted here as Appendix A. The district court's opinion on the merits of the case, dated October 19, 1967, is reprinted here as Appendix B. The report and order of the Interstate Commerce Commission, dated June 9, 1967, are reported at 330 I.C.C. 328. Copies of this report have been lodged with the Clerk. The Commission's two previous reports and orders, dated April 6, 1966, and September 16, 1966, are reported at 327 I.C.C. 475 and 328 I.C.C. 304, respectively.

Jurisdiction

This suit was brought under Title 5, U.S.C. § 704 and Title 28, U.S.C. §§ 1336, 2284 and 2321-25, to annul and set aside an order of the Interstate Commerce Commission dated June 9, 1967, and to obtain injunctive relief. The order of the district court dismissing the complaint was entered on October 19, 1967. Notice of appeal was filed in that court on October 31, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, U.S.C. §§ 1253 and 2101 (b).

Questions Presented

The Commission has ordered consummation of the Penn-Central merger on the assumption that its order in the *Inclusion* case will be upheld, and that this order will bring about the inclusion in N&W of EL, D&H and B&M, the three railroads protected by the conditions of Appendix G, and thus preserve their essential services for the public. The *Inclusion* order is the subject of an

appeal pending in this Court, and it is now apparent, as the district court itself recognized, that the B&M, and possibly also the D&H, will not be included in N&W even if the Inclusion order were to be affirmed. Under these circumstances, the following questions are presented:

1. Did the Commission's order permitting immediate consummation of the Penn-Central merger satisfy the mandate of this Court requiring that the ultimate fate of these roads be determined prior to consummation of the merger?

2. Did the district court violate the rule in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), in upholding an order of the Commission permitting immediate consummation of the Penn-Central merger on the assumption that all three of the protected lines would be included in N&W, even though it recognized that at least one railroad will not be included under the order?

3. Did the Commission violate the requirements of Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 557(c)) when it failed to make any findings which would support either the absorption of one or more of the protected lines into Penn-Central or the indefinite dependence of one or more of those lines on a Penn-Central indemnity—the only alternatives if the fate of all the protected lines is not determined prior to the consummation of the Penn-Central merger?

4. Did the Commission violate Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5 (2)) when it failed to make findings that, under Appendix G, the harm to the public interest and to the unpro-

tected railroads would be outweighed by the benefits to be realized from the merger in light of the now-established fact that the Appendix G conditions will have an indefinite duration?

5. Did the Appendix G conditions create a pooling arrangement within the scope of Section 5(1) of the Interstate Commerce Act (49 U.S.C. § 5(1)), and, if so, did the Commission make the findings required by that section for approval of a pool?

Statutes Involved

The statutes involved in this case are: Administrative Procedure Act, Sections 8(b), 10(c), 10(d), 10(e); 5 U.S.C. §§ 557(c), 704, 705, 706; Judicial Code, 28 U.S.C. §§ 1253, 1336, 2101(b), 2284, 2321-25; Interstate Commerce Act, Sections 5(1), 5(2), 5(9); 49 U.S.C. §§ 5(1), 5(2), 5(9). The text of these statutes is attached hereto as Appendix C.

Statement

This action to enjoin consummation of the merger between the Pennsylvania and New York Central Railroads is before this Court for the second time. Two prior orders of the Commission, dated April 6, 1966, and September 16, 1966, which would have permitted consummation of the merger last year, were enjoined pursuant to the decision of this Court dated March 27, 1967, in *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372 (1967). The present order, authorizing consummation of the merger on or after July 17, 1967, was issued by the Interstate Commerce Commission on June 9, 1967. By order of July 3, 1967, the United

States District Court for the Southern District of New York temporarily enjoined this latest order of the Commission. However, by decision dated October 19, 1967, that court dismissed the complaints attacking the Commission's order of June 9, 1967.

In its two previous reports and orders, the Commission recognized that consummation of the Penn-Central merger would have serious adverse effects upon the Erie-Lackawanna, Delaware & Hudson and Boston & Maine railroads (327 I.C.C. at 529; 328 I.C.C. at 311). In its original report, the Commission stated (327 I.C.C. at 529, 532):

> "The service the three petitioners render their shippers is essential and the public interest dictates that it be preserved. Unless somehow protected, through inclusion herein or by some other equitable means, the petitioners would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve."
>
> * * *
>
> "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger."

The Commission approved immediate consummation of the merger in its original report notwithstanding the

serious adverse effects which the merger would have upon EL, D&H and B&M only because it concluded that these three railroads could be protected against the effects of the merger through a set of protective conditions attached to its order as Appendix G. However, in its decision of March 27, 1967, this Court held that the Commission should have decided "the ultimate fate of the protected roads" before consummation of the merger, rather than relying solely upon protective conditions (386 U.S. at 378). The Court stated that once the protected railroads were included in a major system, "there would be no occasion for the conditions of Appendix G being imposed and hearing and decision on this highly controversial matter would not be necessary . . ." (386 U.S. at 390).

Upon remand the Commission recognized this central aspect of this Court's holding. Although the Commission had already completed hearings on the Appendix G conditions and that matter was at issue and ready for decision, the Commission withheld action until it had also decided the *Inclusion* case, in which EL, D&H and B&M had petitioned for inclusion in N&W.

On June 9, 1967, the Commission decided the *Inclusion* case, holding that the petition of each of these railroads for inclusion in the N&W system should be granted on specified terms and conditions. At the same time, the Commission issued its report and order in this case, permitting consummation of the merger and reinstating, in modified form, the protective conditions which

had been prescribed in the original report. However, the Commission made it plain that the protective conditions were not regarded as a substitute for determination of the ultimate fate of the protected railroads in the *Inclusion* case. Instead, the Commission expressly limited the function of the conditions to serving as an adjunct to the *Inclusion* order by protecting EL, D&H and B&M during any "post merger interim before the said inclusion . . ." (330 I.C.C. at 329)—an interim which the Commission found would be "relatively short" (330 I.C.C. at 350).

In the district court, appellants attacked the Commission's new order permitting consummation of the Penn-Central merger principally upon the ground that it was based upon a mistaken assumption of fact—specifically that the Commission's *Inclusion* order in fact constituted a determination of the ultimate fate of EL, D&H and B&M. Appellants pointed out that the *Inclusion* order had been attacked in court, both by the N&W and the B&M, and that if the order were set aside, it would not under any circumstances determine the ultimate fate of the protected railroads. And appellants further showed that the *Inclusion* order did not constitute a determination of the ultimate fate of EL, D&H and B&M in any case, because the *Inclusion* order would not produce the actual inclusion of at least one, and possibly two, of those railroads even if the order were upheld on judicial review.

Although the stockholders of EL voted to accept the *Inclusion* order before it had been reviewed by the district court, neither D&H nor B&M has submitted the pre-

scribed terms and conditions to its stockholders. B&M has indicated that it has no intention of recommending approval of the prescribed terms.[1] And D&H's chief executive, Mr. Dumaine, has indicated that, far from automatically accepting the *Inclusion* order, he is actively exploring alternatives to such inclusion.[2] Mr. Dumaine's consideration of the alternatives, including possible inclusion in the Penn-Central system, is especially important since he represents the D&H's principal stockholder, and an affirmative vote of the stockholders representing two-thirds of the outstanding stock is necessary in order to accomplish inclusion.

In its opinion of October 19, 1967, the district court conceded that the *Inclusion* order will not constitute a

---

[1]B&M has expressly stated that it would prefer denial of its petition for inclusion to accepting the terms prescribed by the Commission (Brief of B&M in Delaware and Hudson vs. United States, S.D.N.Y. No. 67 Civ. 2451, dated September 5, 1967, p. 4):

> "If the Commission is correct in its evaluation of B&M then B&M's Petition for Inclusion should have been denied . . ."

The reason B&M has taken this position is clear. Recent market prices for B&M stock, which turned over 200% in a single year, are highly inflated, far beyond even the price set for the stock in the *Inclusion* case. As Witness Lenz, Executive Vice President of Merrill Lynch, Pierce Fenner & Smith Incorporated, testified (F. D. No. 21510, Ex. N&W-6, p. 6):

> ". . . B&M common and preferred stocks have no significant value . . . . The inflation of the stock prices, in my judgment, is due primarily to the speculative possibility of inclusion in a profitable Eastern rail system and the current proxy fight being waged for control of B&M. In the absence of these factors, B&M stocks would have only nominal value."

[2]President Dumaine informed D&H's stockholders in a letter, dated August 21, 1967 (Bensel affidavit of 9/5/67, p. 8) that the Board would continue to explore "other alternatives that may be available to D&H" prior to presenting the matter to the stockholders. Mr. Dumaine subsequently made it plain in an interview with the *Wall Street Journal* that one of the alternatives he had in mind was that "D&H should become part of the merged Pennsy-Central" (Bensel affidavit of 9/5/67, pp. 8-9).

determination of the ultimate fate of all three of the protected railroads. Although the court, despite the explicit statements of D&H's chief executive to the contrary, refused "to take seriously the possibility that D&H stockholders will reject . . . the inclusion terms" (App. B, p. 66),[3] it admitted that "the situation as to B&M differs" from that of D&H (App. B, p. 67). The district court conceded that B&M would not be included in N&W under the *Inclusion* order because the stockholders of B&M will not accept the prescribed terms. Thus, in affirming the Commission's order, the district court found the factual premise upon which that order had been based to be incorrect.

The district court reviewed the Commission's order permitting consummation of the Penn-Central merger concurrently with its order in the *Inclusion* case, and, in its opinion of October 19, 1967, upheld both these orders. With respect to the *Merger* order, the district court relied primarily upon the fact that it had found the *Inclusion* order to be lawful. Although the district court conceded that its decision in the *Inclusion* case had been a difficult one and that the Commission's report in that

[3]The district court relied upon a statement by counsel for the D&H that the D&H Board "unanimously resolved that the D&H would recommend inclusion terms as fixed by the Commission" (Tr. 9/28/67, p. 150). However, D&H counsel was careful to point out that the D&H stockholders might "not accept the terms" and that therefore an alternative system was a "possibility." The statement of D&H counsel thus did not dispel the doubt that D&H will accept inclusion in N&W. In the light of Mr. Dumaine's statements, that doubt cannot be dispelled, unless, instead of speculating about the outcome of the D&H stockholder vote, this question is determined by ordering the vote to be taken, as these appellants have urged.

case was not a model of "logical perfection" (App. B, p. 49), it nonetheless concluded that this Court was unlikely to reverse its decision (App. B, p. 69). To the extent that it recognized that the *Inclusion* order would not take care of all of the problems created by the merger, the district court relied upon its conclusion that protective conditions had been prescribed which could be maintained in effect indefinitely. Thus, instead of adhering to this Court's direction that the ultimate fate of the protected roads—that is, their inclusion in a major system—should be decided *prior* to consummation of the merger, the district court held that the "Appendix G conditions take sufficient care" of the protected roads "while they work out their future" *following* the consummation of the merger (App. B, p. 68).

The Questions Presented Are Substantial

Concurrently with the appeal in this case, N&W is filing an appeal from the decision of the district court upholding the *Inclusion* order. If the *Inclusion* order is set aside, the order permitting consummation of the merger must also be set aside. But even if the *Inclusion* order is upheld, the order in the *Merger* case cannot stand, for it is now clear that the Commission's order in the *Inclusion* case will not determine the ultimate fate of all three of the protected railroads. Although the district court has refused to recognize that the problem exists with respect to the D&H, the fact is that there remains a serious doubt that the stockholders of D&H will accept the *Inclusion* order. And, in any event, it is now clear, and the district court has implicitly so found,

that even if the Commission's present order permitting immediate consummation of the Penn-Central merger becomes effective, B&M will remain outside of any major system even though the Commission has found that it will thereby be threatened with destruction. The questions raised by this appeal each relate to this established fact. As will be shown below, each of these questions presents a substantial issue which merits the consideration of this Court.

I. AS INTERPRETED BY THE DISTRICT COURT, THE COMMISSION'S ORDER OF JUNE 9, 1967, IS IN CONFLICT WITH THE MANDATE OF THE SUPREME COURT.

In enjoining consummation of the Penn-Central merger pursuant to the Commission's orders of April 6, 1966, and September 16, 1966, this Court made it clear that the Commission could not properly permit the merger to go through until the permanent home of the three protected carriers had been finally determined (386 U.S. at 378, 390):

> "We believe that the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads."
>
> * * *
>
> "[I]t is necessary that the decision as to the future of the protected roads *and their inclusion in a major system be decided prior to consummation of the Penn-Central merger.*" (Emphasis added.)

In view of this holding, the Commission plainly erred in ordering consummation of the merger before its decision in the *Inclusion* case had been reviewed judicially, for the "determination" required by this Court necessarily encompassed any review proceedings in the *Inclusion* case (386 U.S. at 392):

> "If its [the Commission's] order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties."[4]

If the *Inclusion* order is reversed by this Court, no valid determination of the ultimate fate of the protected roads will have been made, and, in that event, the mandate of this Court will in no sense have been satisfied. As the United States has said (Memorandum for the United States on Further Injunctive Relief, 66 Civ. No. 2860, et al., S.D.N.Y., p. 5):

> "Should the Court set aside the *Inclusion* order on other than purely technical grounds, we would be as far from a 'decision as to the future of the protected roads' which is a pre-condition to consummation of the merger (386 U.S. at 390), as we were when the Supreme Court spoke in March."

Moreover, even if the *Inclusion* order is affirmed, the future of the protected roads will be as far from decision

[4]There is no dispute that the review of the Commission's orders has been expedited to the fullest extent, and appellants in their Motion to Advance, filed contemporaneously with this Statement, have requested an expedited schedule before this Court.

as it was when this Court spoke in March, since it is now clear that at least one of the protected railroads will not accept the terms of that order. The Commission's basic finding in this case was that consummation of the Penn-Central merger would threaten the continued viability of EL, D&H and B&M, and should not be permitted unless their ability to provide essential rail services was assured (327 I.C.C. at 529). This Court's requirement that the inclusion of these three railroads in a major system be determined prior to consummation of the merger thus gave effect to the solution which the Commission itself had recognized was necessary to meet the problems which the Penn-Central merger would create for EL, D&H and B&M (327 I.C.C. at 532):

> "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged. . . ."

The Commission has never receded from this basic finding. However, because of its assumption that inclusion of the protected railroads in N&W was imminent, the Commission refused to consider any other steps necessary to ensure that the future of the protected roads would be determined prior to the consummation of the Penn-Central merger. As a result, the Commission's order of June 9, 1967, directly conflicts with the mandate of the Supreme Court.

There are two "major systems" in which the Commission could have ordered the protected roads to be included: (1) the N&W system (in its present form, or merged with C&O), or (2) the Penn-Central system.

If the Commission had decided which *one* of these systems was to be the home of the protected roads while foreclosing entrance into the other, its determination would have been effective. The stockholders of the protected roads would then have been obliged, as the only alternative to destruction by Penn-Central, to accept equitable terms from *the* system in which the Commission found their inclusion to be in the public interest.

The Commission failed to follow this course. By leaving open the alternative of ultimate inclusion in Penn-Central, the Commission has allowed B&M, and D&H if it so chooses, to refuse the terms of the *Inclusion* order and to shop with Penn-Central for even more favorable financial terms. Assuming that the indemnity, which these railroads would receive from Penn-Central as compensation for loss of traffic, would satisfy the financial interest of their stockholders, such an indemnity would not serve the public interest in preserving the traffic needed to maintain these railroads as competitors of Penn-Central.[8]

As a result, the "ultimate fate" of these lines is no closer to determination than when this case was before this Court last March. Under the Commission's own findings, all three of these lines must be placed in a major system if their transportation services are to survive. If they are not to be part of N&W, in what system, if any, should they be included? Plainly, some further determination will be necessary before the ultimate fate of these lines can be known; and this

[8]By leaving open to B&M and D&H the possibility of inclusion in Penn-Central, the Commission put the stockholders of these railroads in a position in which they could afford to reject inclusion in N&W. The efficacy of the *Inclusion* order was thus destroyed, not because of the already-inflated price the Commission set on their inclusion in N&W, but because the Commission refused to close the door on their entering Penn-Central.

Court has directed that the merger be stayed until this determination is made.

II. THE DISTRICT COURT ERRED IN AFFIRMING THE ORDER OF JUNE 9, 1967, ON A GROUND ENTIRELY DIFFERENT FROM THAT RELIED UPON BY THE COMMISSION.

Although it recognized that the ultimate fate of the protected lines had not been determined, the district court upheld the Commission's order permitting consummation of the merger on the ground that the "Appendix G conditions take sufficient care of them [the protected roads] *while they work out their future*" (App. B, p. 68; emphasis added). As already shown above, this holding is in direct conflict with the mandate of this Court, since that mandate requires that the future of the protected lines be authoritatively determined prior to the merger, not that they be given some traffic and revenue protection while they attempt to work out their future at some date after the merger. Moreover, apart from the mandate, this aspect of the district court's decision must be reversed, since the basis of the district court's action differs fundamentally from that of the underlying Commission order which it upheld.

The Commission expressly predicated its order in the *Merger* case on the assumption that the *Inclusion* order would be accepted by all three of the protected railroads. At the outset of its report, the Commission described the Appendix G protective conditions as designed only to provide "interim protection" pending inclusion (330 I.C.C. at 329). Later, in discussing the

substantive aspects of the protective conditions, the Commission repeated this description of the limited purpose of the conditions, stressing the fact that in its view "the protective period will be relatively short" (330 I.C.C. at 350). This same factual assumption was stated in dealing with the position of the unprotected lines. The Commission held that the fears of those lines that EL, D&H and B&M would join with Penn-Central to divert traffic from them were baseless because the protected lines "expect to become affiliates of N&W" (330 I.C.C. at 355). Nowhere does the Commission's report deal with the possibility that one or more of the protected lines might *not* become an affiliate of N&W, that it might reject the *Inclusion* order, or that the Appendix G conditions might have to be in effect for a period far beyond the short interim that would have been necessary to handle the mechanics of inclusion. In short, the Commission's report is based upon a factual premise which is precisely contrary to that adopted and relied upon by the district court, which held that EL, D&H and B&M could be protected indefinitely by Appendix G while they work out their future.

In *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), this Court stated:

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds

> are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

It was for the Commission, not the district court, to decide in the first instance whether an arrangement of indefinite duration like that created by Appendix G is in the public interest. In upholding the Commission's order on its own theories without regard to findings in the Commission's report, the district court has plainly propelled itself "into the domain which Congress has set aside exclusively for the administrative agency" in precisely the manner condemned by this Court in *Chenery* (332 U.S. at 196). The fact that the Commission found the Appendix G conditions to be in the public interest for the brief interim required for judicial review and ministerial corporate functions (330 I.C.C. at 329) cannot be stretched to condone the arrangement on an indefinite or even permanent basis, particularly where the Commission explicitly relied upon the interim nature of the conditions to justify their use as an aid to the effectuation of the *Inclusion* order. The plain fact is that it is the district court, not the Commission, which has found that imposition of the Appendix G conditions for an indefinite period would be in the public interest, and that is a finding which the district court has no power to make.

The district court's error stems from its extremely restricted view of the *Chenery* principle, which it construes as precluding a reviewing court only from affirming an agency decision for reasons which it believes "the agency might not embrace" (App. B, p. 69). Its interpretation makes wholly irrelevant the question of whether or not the agency actually relied on those reasons. Under this view, which the district court seeks to support by reliance

upon this Court's decision in *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 248 (1964), the courts would be free, despite *Chenery*, to supply findings missing from an administrative agency's report so long as those findings are consistent with the Commission's ultimate conclusion. Thus, the district court apparently felt itself free to find that an Appendix G arrangement of indefinite duration is in the public interest because such a finding is consistent with the Commission's ultimate conclusion in the case—that immediate consummation of the Penn-Central merger is in the public interest. There is no other way in which that ultimate conclusion could be supported.

The district court's view of the *Chenery* principle would render that principle practically meaningless and make the reasoning and findings underlying an agency's ultimate conclusions mere window dressing. If a court finds that the administrative agency has not stated findings which support its conclusion, the agency may well decide to adhere to its findings and alter its conclusion upon remand. But it is for the Commission, not the courts, both to make findings and to decide what conclusions flow from them. This Court recognized this very point when it refused to permit Board counsel to provide a rationale for administrative action in *Labor Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965):

> "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which

> Congress has set aside exclusively for the administrative agency.' *Securities & Exchange Comm'n* v. *Chenery Corp, supra*, at 196."

Thus, the Court held that whether or not findings might be devised to support agency action, and regardless of whether the administrative agency itself might conceivably adopt such findings, a court cannot affirm the agency's action unless those findings have in fact been made by the agency.

The same reasoning requires rejection of the rationale offered by the district court to support the Commission's ultimate conclusion that immediate consummation of the Penn-Central merger is in the public interest. Whether or not the Commission's conclusion might have been supported by prescribing an Appendix G arrangement to protect EL, D&H and B&M while they work out their future, the Commission did not prescribe Appendix G for that purpose. The court's task is to review the Commission's order on the basis upon which it was made, and, on that basis, the order here cannot be upheld.

III. THE COMMISSION HAS NEVER PASSED UPON THE CLAIM THAT APPENDIX G CONDITIONS OF INDEFINITE DURATION WILL SUBSTANTIALLY INJURE THE UNPROTECTED EASTERN RAILROADS.

Throughout the proceedings subsequent to the issuance of the Commission's original report, which had imposed the Appendix G conditions without notice

or hearing, the unprotected railroads have urged that such conditions are contrary to the public interest. Immediately upon the issuance of that report, the unprotected railroads pointed out that Appendix G would eliminate competition between Penn-Central and the protected railroads by creating a revenue pool. Subsequently at the hearings held by the Commission, this contention was thoroughly documented by the testimony of Dr. Merton J. Peck, Chairman of the Department of Economics at Yale University (FH-42, pp. 8-9):

> "The indemnity plan has the essential features of revenue sharing systems. The participants in each of the three revenue sharing systems involved have an interest in expanding the total revenue of those in that system at the expense of non-participants. The participants in each of the revenue sharing systems also have less incentive to expand their own sales at the expense of the other party in their revenue sharing system."

The unprotected railroads also demonstrated the injury to which they would be subjected by the Appendix G conditions. Thus, it was shown that the community of financial interest created between Penn-Central and the protected carriers would, over a period of time, induce each of these lines to route traffic away from the unprotected lines to increase the size of the revenue pool in which they would share. Moreover, it was pointed out that Penn-Central's temporary indemnity payments to the protected lines would tend ultimately to force the protected lines into the Penn-Central system. In view of the fact that the payments would terminate

upon their inclusion in another system, only Penn-Central would be in a position to deal with the protected lines on a basis which would include the value of such payments.

In its report in this case, the Commission rejected each of these contentions, but it did so on the express ground that harm to the public and to the other Eastern railroads could not result because Appendix G would be in effect only for a "relatively short" period of time (330 I.C.C. at 350) and that, during this period, the protected lines' action would not be influenced by Appendix G because they would "expect to become affiliates of N&W" (330 I.C.C. at 355).[6] However, it is now plain that neither of these reasons has any application to the situation as it will exist if the Commission's order becomes effective. The protective period will not be "relatively short" since, under the district court's own holding, it must continue while at least one, and possibly two, of the protected lines "work out their future" (App. B, p. 68). And during a period when the railroads protected by Appendix G are shopping for inclusion in Penn-Central, they cannot be regarded as expecting "to become affiliates of N&W."

The failure of the Commission to deal in any way with the facts that the protective period will be an ex-

[6]The district court was inconsistent in its treatment of the Appendix G conditions. When attempting to justify consummation of the merger despite the fact that B&M will not be included in N&W, the court treated the conditions as applying indefinitely "to take sufficient care of them [B&M] while they work out their future" (App. B, p. 68). However, when attempting to gloss over the injury these conditions will impose on the unprotected roads, the court characterized the conditions as "limited and temporary" (App. B, p. 13, n. 9), and assumed that all three of the protected roads will be "a permanent part of a strong N&W system" (App. B, p. 14).

tended one and that the protected lines will not be prospective affiliates of N&W plainly requires that the Commission's order be set aside. What will be the effect of the Appendix G conditions upon competition if those conditions remain in effect over a period of years? Will Appendix G cause a substantial diversion of traffic from the unprotected railroads over such a period of time?[7] How long will it take before the indemnity payments by Penn-Central to the protected lines mount to such a figure that their inclusion in any other major system will cease to be feasible?[8]

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[7] In rejecting the contention that the unprotected roads would be injured by the Appendix G conditions, the district court relied entirely upon the Commission's findings, which, as we have shown, were expressly based on the premise that the conditions would serve an interim function of relatively short duration. Neither the Commission nor the district court has ever found that the unprotected roads would not suffer diversion under an Appendix G of indefinite duration. Nor could such a finding be made. As the Government pointed out before this Court (Memorandum for the United States in *Baltimore & Ohio* v. *United States*, p. 27):

> "To give the three smaller roads a permanent stake in the financial success of Penn-Central would be almost like decreeing their affiliation with the Penn-Central system and thereby giving that system a virtual rail monopoly in New England and New York."

And B&M has made it plain what it could and would do if it were made an affiliate of Penn-Central (Brief of B&M in S.D.N.Y. 67 Civ. No. 2451, pp. 42-43):

> "If B&M were a member or ally of Penn-Central, B&M would obviously work together with that system for their joint benefit. EL, D&H and N&W would all suffer directly as the result of B&M's non-inclusion."

[8] The difficulty in working out the inclusion of any railroad receiving a temporary indemnity from Penn-Central in any system other than Penn-Central arises from the failure of the Commission to make provision for any sort of capital indemnity—a failure which even the district court conceded was "debatable" (App. B, p. 69). The district court nonetheless upheld this aspect of the Commission's order on the theory that the matter was academic in any event, since the traffic conditions of Appendix G are so stringent that Penn-Central will not "be able to divert a significant amount of traffic" from the protected lines (App. B, p. 17). As the district court pointed out, this is precisely what it held when the case was before it last year. But the court neglected to recognize that this was precisely the ground upon which its last decision was reversed by this Court (386 U.S. at 388).

Although Section 8(b) of the Administrative Procedure Act requires that "All decisions . . . shall . . . include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" (5 U.S.C. § 557(c)), there are no findings at all on any of these issues. Yet the issues are clearly material, since it is now clear that the Appendix G conditions will remain in effect indefinitely for at least one of the protected lines. Since it is well settled that the requirement of Section 8(b) is to be vigorously enforced, *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168 (1962), this absence of findings requires that the Commission's order here be set aside.

The statutory requirement that the Commission make findings as to the consequences of its action is particularly important here, for the inevitable consequence of the action taken is to turn any railroad which decides to reject inclusion in N&W into an ally of Penn-Central, both on a temporary basis as a direct result of Appendix G, and on a permanent basis because it will ultimately force that railroad's complete inclusion in Penn-Central. This consequence is a matter of the utmost importance, both to the other railroads operating in the East and to the public interest. As shown by the chart on the following page, the proposed Penn-Central system already occupies 48.3 percent of the Eastern railroad market. Moreover, inclusion of B&M in Penn-Central would create a monopoly of intercity rail service in New England, a fact which is important not only because it shows the direct anticompetitive consequences of inclusion of B&M in Penn-Central, but also because it

Present Shares of Eastern Railroad Market

	Railway Operating Revenues (1966)*	
	Dollars (Millions)	Percent of Total
PROPOSED PENN-CENTRAL SYSTEM		
Pennsylvania Railroad system	$ 997.9	25.9%
New York Central Railroad system	739.5	19.2
New Haven	125.6	3.2
Total Penn-Central system	$1,863.0	48.3
PROTECTED CARRIERS		
Erie-Lackawanna	$ 235.8	6.1
Delaware and Hudson	42.2	1.1
Boston and Maine	62.4	1.6
Total Penn-Central and Protected Carriers	$2,203.4	57.1%
UNPROTECTED CARRIERS		
Norfolk and Western system	$ 621.4	16.1
Chesapeake & Ohio-Baltimore & Ohio system	824.0	21.4
Reading	104.8	2.7
Central Railroad Company of New Jersey	53.4	1.4
Western Maryland	50.5	1.3

*As shown in reports filed with the Commission by the carriers and made a part of the administrative record in this proceeding.

indicates the reason why B&M refuses to accept terms which are anywhere near to equitable for inclusion in N&W. The profits to be derived from a New England monopoly would certainly be far greater than any value of B&M to N&W, and B&M intends to seek a price based upon such profits.[10]

Plainly, the inclusion of B&M, or both D&H and B&M, in Penn-Central would be harmful to every other railroad operating in the East. Even the district court seems to concede this (App. B, p. 18). But that court nonetheless refused to deal with the contention that the order here tends to force any railroad remaining independent into Penn-Central, saying (*ibid.*):

> "N&W is fully protected by its right to oppose inclusion of any of the three roads in Penn-Central."

This does not answer the basic problem. Of course, N&W and every other Eastern railroad could and doubtless would oppose inclusion of any of the protected lines in Penn-Central. However, that right is not sufficient to protect the interests of any of the unprotected lines.

The Commission would not be in a position to turn down any effort by a protected line to obtain inclusion in a major system. Having found that the service of these lines must be preserved and that these lines cannot

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[10] The court below relied on the illusory point that, by rejecting inclusion in N&W, B&M would lose the "right" to compel the Commission to include it into Penn-Central (App. B, p. 57). However, B&M is already on record that it plans to pursue such inclusion "by agreement voluntarily negotiated between the parties and approved by the Commission" (B&M Brief in S.D.N.Y. 66 Civ. No. 2860, p. 6).

survive as independent carriers after the Penn-Central merger is consummated, the Commission is hardly likely to preclude their inclusion in Penn-Central because of considerations of competitive balance. More likely, the Commission would hold that in these circumstances competitive considerations are outweighed by the benefits to be gained. Moreover, their inclusion in a major system is the only means of terminating the Appendix G conditions which deprive the public of many, if not substantially all, of the benefits which the Commission has found the Penn-Central merger will produce (see pp. 27-28, *infra*). Thus, the unprotected lines' only real chance to prevent inclusion of any of the protected lines in Penn-Central is to avoid the circumstances which make that inclusion the only feasible way to preserve the service of those railroads and to achieve the public benefits of the Penn-Central merger.

IV. BY FAILING TO DETERMINE WHETHER THE PENN-CENTRAL MERGER, CONDITIONED BY A PERMANENT APPENDIX G, IS IN THE PUBLIC INTEREST, THE COMMISSION VIOLATED SECTION 5 OF THE INTERSTATE COMMERCE ACT.

The substantial harm which is certain to result, both to the public interest and to other Eastern railroads, from consummation of the Penn-Central merger under circumstances which will require an indefinite continuation of the Appendix G conditions is only a part of the problem with which the Commission had to deal in this case. Section 5 of the Interstate Commerce Act does not preclude the imposition of harm upon other railroads, or even upon the public, if such harm

is outweighed by merger benefits which justify a finding that, overall, the merger with all of its terms and conditions is in the public interest.

The problem with the Commission's report and order in this case is that it makes no findings at all with respect to the public interest in consummating the merger so long as it must be subject to Appendix G for an indefinite period. As previously shown, in every one of its findings on the matter of the harm which will be inflicted by the merger, the Commission assumed that Appendix G would only be of short duration. The Commission's treatment of the other aspect of the problem—the benefits to be realized from the merger—is even more defective, for in this part of its report the Commission ignored the Appendix G conditions entirely. Thus, although the undisputed evidence of record showed that there could be no substantial merger savings or public benefits from the merger so long as it was conditioned by Appendix G, the Commission made no findings on this matter. Instead, it made no evaluation of the merger under Appendix G, and found simply that "the public interest requires that the applicants be permitted to commence achieving the substantial savings which their merger will make possible *at the earliest possible date*," and that "the shipping public should not be denied the improved service which *ultimately* the merged company can provide" (330 I.C.C. at 361; emphasis added).

These findings do not justify consummation of the merger under circumstances that will require a continuation, indefinitely and possibly even permanently, of conditions which preclude attaining those benefits. The district court recognized this defect but, instead of

remanding the case for necessary findings, the court made its own findings on the basis of its own concept of "common sense," stating that (App. B, p. 15):

> "Nothing in Appendix G prevents the realignment of management, the elimination of many duplications in personnel, the undertaking of financing, or the refurbishing and, in many cases, the implementation of plans for better and more economical service."

But these are not matters to be decided by "common sense" or judicial notice; they are matters of fact to be proved by evidence. And the undisputed evidence in the record shows that the district court's findings are not "common sense" at all. At the reopened hearings on Appendix G, N&W introduced evidence showing that under the prescribed conditions savings could not be achieved in any of the areas mentioned by the district court (FH-45). Penn and Central made no attempt to controvert this showing. Quite the contrary, the Pennsylvania's own witness admitted that "there is no chance of any substantial savings in the next two years" (Tr. 22344) and that "the first two million dollars we save as a result of the merger is a good five years away" (Tr. 22343).

We are thus left with an order of the Commission permitting consummation of the Penn-Central merger subject to the Appendix G conditions, despite the harm which would be inflicted upon the public and upon the unprotected railroads, without findings that there would be offsetting savings or service improvements in the foreseeable future. The Commission's order of June 9, 1967,

thus comes down to the very same attempted justification which was offered for the Commission's earlier orders of April 6, 1966, and September 16, 1966—that an effort must be made to save the New Haven railroad.

Although both the Commission (330 I.C.C. at 361) and the district court (App. B, p. 70) rely heavily on the plight of the New Haven, it seems plain in principle that a merger of the two largest railroads in the East cannot be justified merely because those railroads are willing to lend a bankrupt railroad some badly needed money as a device to obtain the right to merge. True, the New Haven is in serious financial difficulty. And true, the preservation of the services of that railroad are important to the many communities which it serves. But these needs do not justify giving Penn and Central an opportunity to buy the right to consummate their merger at the cost to the public interest of creating a huge financial combine which will dominate the Eastern railroad market.

Moreover, even if the plight of the New Haven were to be accorded some weight in this matter, it should be given consideration only in the context of the impact of the Penn-Central merger upon the entire railroad system in the East. As this Court pointed out last Term (386 U.S. at 392):

> "After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation."

There is not a scrap of evidence in this case or a single finding in the Commission's report which indicates that the Penn-Central merger can be "handled properly" if it must be accompanied by the conditions of Appendix G for the indefinite future.

Conclusion

For the foregoing reasons, probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIE-LACKAWANNA RAILROAD COMPANY,
Plaintiff,

v. 66 CIV. 2860

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants.

THE DELAWARE & HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON and BOROUGH OF FREEDOM, and BOSTON & MAINE R.R. CO.,
Intervening Plaintiffs,

PENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,
Intervening Defendants.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY,
Plaintiffs,

v. 66 CIV. 2903

UNITED STATES OF AMERICA,
Defendant.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY,
Plaintiffs,

v. 66 CIV. 2914

UNITED STATES OF AMERICA,
Defendant,

WESTERN MARYLAND RAILWAY COMPANY,
Intervening Plaintiff.

Motions heard June 28, 1967 before FRIENDLY, C.J. and WEINFELD and LEVET, D.JJ.

Cravath, Swaine & Moore, by Thomas D. Barr, and Alexander & Green, for plaintiff Erie-Lackawanna R.R.

Nixon, Mudge, Rose, Guthrie, Alexander & Mitchell, by Harry F. Silleck, Jr., for plaintiff Delaware & Hudson R.R.

Arthur Arsham, by Gordon P. McDougall, for intervening plaintiffs Milton J. Shapp, City of Scranton and Borough of Freedom.

Gerald E. Dwyer for intervening defendants New York Central R.R. and Conboy, Hewitt, O'Brien and Boardman for intervening defendant Pennsylvania R.R., by James B. Gray.

Howard E. Shapiro for defendant United States of America.

Robert W. Ginnane for defendant Interstate Commerce Commission.

Robert W. Peet and Sullivan & Worcester, by Joseph Auerbach, for Trustees of New York, New Haven & Hartford R.R.

Kelley, Drye, Newhall, Maginnes & Warren; Sidley & Austin by Howard J. Trienens; Wilmer, Cutler & Pickering; and Wheeler & Wheeler, for plaintiffs Norfolk & Western Ry., Baltimore & Ohio R.R., and Chesa-

peake & Ohio Ry. and intervening plaintiff Western Maryland Ry.

Richard J. Lally and Martin J. Flynn for Trustees of the Central Railroad Company of New Jersey, plaintiff.

Macklin, Hanan & McKennan, by William P. Quinn, for plaintiff The Reading Company.

Walter J. Myskowski, for State of New York, intervening defendant.

William J. Lynch, for State of Connecticut, intervening defendant.

MEMORANDUM ORDER

By a supplemental report and order on reconsideration and further hearing in F.D. No. 21989, Pennsylvania Railroad Company—Merger—New York Central Railroad Company, 330 I.C.C. 328, served June 12, 1967, the Interstate Commerce Commission authorized consummation of the merger of the Pennsylvania Railroad Company (PRR) and the New York Central Railroad Company (NYC) on the effective date of the order, to wit, July 17, 1967; the order provided that if the authority therein conferred was not exercised within 180 days thereafter, it should be of no further force or effect. At the same time the Commission issued a further report and order in F.D. No. 21510, Norfolk & Western Ry. Co. and New York, Chicago & St. Louis Railroad Company—Merger, etc., directing inclusion of the Erie-Lackawanna (E-L), the Delaware & Hudson (D&H) and the Boston & Maine (B&M) in the Norfolk & Western (N&W). These rulings have precipitated a number of motions in these actions, have given birth to several new actions, and threaten to spawn still more. N&W has brought suit in the Western District of Virginia to enjoin enforcement of the inclusion order. E-L has brought an action in this court to enforce that order, which N&W has moved to dismiss, the United States and the ICC have moved in the Western District of Virginia for a stay of N&W's action in that court. The D&H and B&M, both of which have petitioned the I.C.C. for reconsideration of the terms of the inclusion order, have also sued in this court, they support the direction for their inclusion in the N&W but challenge the financial terms. The Borough of Moosic has brought

an action in the Middle District of Pennsylvania to enjoin the orders both in the merger case and in the inclusion case; we are advised that the City of Pottsville has joined in that action and that Milton J. Shapp and the City of Scranton, intervening plaintiffs in these actions, have also intervened as plaintiffs therein. The Trustees of the Central Railroad of New Jersey (CNJ), a plaintiff in one of the actions in this court, have informed us of their intention to urge the CNJ's objections to the PRR-NYC merger not in this court but in the District of New Jersey. The Reading Company, also a plaintiff here, intends to pursue a similar course either in the Eastern District of Pennsylvania or by intervention in some other suit, presumably the CNJ's. The B&O, C&O, N&W, and Western Maryland, plaintiffs or intervening plaintiffs here, also assert and presumably intend to pursue supposed rights to attack the merger order by new actions in what they term "a court of appropriate statutory venue," to wit, the district courts for Maryland, Northern Ohio, and Western Virginia. Such a proliferation of actions in many different courts is a far cry from the expedited and early determination of review proceedings to which a majority of the Supreme Court referred in reversing our denial of a temporary injunction, Baltimore & Ohio R.R. v. United States, 386 U.S. 372, 392 (1967); indeed, considered in the aggregate, it outruns even the fears of the four dissenters as to what may be done by "ingenious counsel bent on delay." 386 U.S. at 472.

I.

In an effort to introduce a modicum of order into so much of this chaos as relates to the Commission's supplemental order in the merger case, PRR and NYC have moved that we require each plaintiff or intervening plaintiff in the instant actions to file supplemental complaints setting forth the claims now made in the light of the Commission's supplemental report on reconsideration, direct that the complaint of any such party not so amending its complaint be dismissed with prejudice, and set a schedule for responsive pleadings, briefs and final hearing. There are several kinds of unfinished business in these actions. One concerns objections to the Appendix G protective conditions, now revised, whether on the ground of inadequacy from the standpoint of the three protected roads or on the ground, previously urged by B&O, C&O, N&W, CNJ, the Reading, the Western Maryland, and C. & E.I., "that these provisions created a 'community of interest' between the protected roads" and the merged company which would produce additional diversion, see 259 F. Supp. at 970, 976; we have been told by counsel for the N&W and other plaintiffs that they regard the revised conditions as even worse in this respect. These railroads and possibly others apparently intend to argue also that the Commission's prescription of any protective conditions was inconsistent with a passage in the Supreme Court's opinion, 386 U.S. at 390. In addition certain special objections raised by C. & E.I., the Western Maryland, CNJ and the Reading are as applicable to the supplemental order on reconsideration as to those of 1966. Broadest of all is the objection of intervening plaintiffs Milton J. Shapp, the

City of Scranton and the Borough of Freedom,[1] which assails the validity of the merger on a wide front. Inherent to all these is the question, raised by another motion discussed below, of extending the injunction against consummation until these issues have been decided.

The N&W, B&O, C&O, Western Maryland, the Trustees of the CNJ, the Reading,[2] Shapp and the City of Scranton oppose the motion made by the Pennsylvania and the Central; the United States, the Interstate Commerce Commission, and the states of New York and Connecticut support it. The basic claim of the railroads opposing the motion is that the actions in this court have ended and that anyone seeking to attack the supplemental report and order on reconsideration may and indeed must do so in a new action in "a court of appropriate statutory venue"; the N&W and the railroads allied with it contend also that if the inclusion order is ultimately sustained and if the stockholders of the protected roads immediately accept, the protective conditions may never take effect and hence are not now ripe for review. Shapp and the City of Scranton also contend that the actions here have come to an end; they prefer to conduct their further attack on the merger by intervening in the suit just brought by the Borough of Moosic in the Middle District of Pennsylvania against both the merger order and the inclusion order rather than "in a distant and foreign forum . . . ."

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[1]We are advised that the Borough of Freedom does not intend to participate further.

[2]The Reading has moved to "quash" the motion; we deny this.

The parties opposing the motion are wrong in saying these actions have terminated. The subject of the complaints of the plaintiffs and intervening plaintiffs was the Commission's approval of the merger, as it then stood or as it might stand in the future. All that we had before us for decision last fall and the Supreme Court had before it on appeal, see 386 U.S. at 378, were motions for interlocutory relief, to wit, temporary injunctions of the merger pending the reconsideration the Commission had already granted; the actions could not proceed to final hearing until that had been completed. The Supreme Court made it clear that the issues of "the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties," *ibid.*, remained for final determination in these actions after the Commission had made its supplemental order on reconsideration. Compare Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188, 203 (1939); New York Central R.R. v. United States, 207 F. Supp. 483, 498 (S.D.N.Y. 1962). Indeed, the position taken by N&W and the roads associated with it in opposition to the motions of PRR and NYC contrasts rather strangely with their own request for further injunctive relief in the actions brought by them in this court. If the actions remain pending for the grant of relief which the N&W and its allies want, especially for what, as will hereafter appear, we consider relief that may go beyond the Supreme Court's mandate, they are pending for other purposes as well.

The idea that litigants challenging an order of a federal administrative agency may invoke the jurisdiction of one federal court, require it to expend its

energies in becoming familiar with the subject-matter, obtain interlocutory relief against enforcement of the order, and then take their grievances to another federal court which they consider may be more favorable while their complaints remain pending for final disposition, does not commend itself in general; and surely this case, where expedition is so important, would be the last one in which to countenance proceedings of that sort. In re Georgia Power Co., 89 F.2d 218 (5 Cir.), cert. denied, 392 U.S. 692 (1937), sustaining a refusal to allow dismissal without prejudice and an injunction against a second suit, strongly supports our view. Whatever rights many of these plaintiffs initially had to sue elsewhere,[3] they brought their actions to enjoin the merger here, and any objections on the score of venue have long since been waived. The plaintiffs and intervening plaintiffs would have been surprised and rightly aggrieved if, in the event of their desiring to prosecute these actions in this court after the ICC's supplemental report on reconsideration, the United States had insisted that new process issue so that a venue objection could have been taken. Their reliance on New York Central R.R. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961), is wholly misplaced. The issue raised by the parties in that case was whether an action brought here should be transferred to the district court for Maryland under 28 U.S.C. § 1404(a), and we held it could not be. Our remarks as to refusal of a stay of the action in this court

[3]Once we entertained E-L's suit to enjoin the merger, actions in other districts seeking the same relief might well have been stayed by those courts on the United States' stipulating not to contest venue here. See Kansas City Southern Ry. v. United States, 282 U.S. 760, 763-64 (1931); New York Central R.R. v. United States, 200 F. Supp. 944, 950-51 (S.D.N.Y. 1961).

must be read in the light of the facts that the New York interests had never invoked the jurisdiction of the District Court for Maryland, since they supported rather than opposed the orders the I.C.C. had initially issued, see 200 F. Supp. at 495; that the Maryland district court had taken final action, Baltimore & Ohio R.R. v. United States, 151 F. Supp. 258 (D.Md.), vacated 355 U.S. 175 (1957), and not merely granted interlocutory relief as has been done here; and, as this court noted, that the Maryland interests recognized this by bringing "an entirely new action" after the Commission's further order, see 200 F. Supp. 946 n.3. While obviously no plaintiff should be forced to litigate against his will, that does not mean that he is wholly free at his own volition to stop litigation in the court of his initial choice and begin again in another, regardless of the interests of other parties and the public interest. See F.R. Civ. P. 41(a)(2). Cf. Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14 (S.D.N.Y. 1953).

As to the argument concerning ripeness, while it is theoretically possible that the protective conditions may never need to be invoked, realism suggests the contrary. If the inclusion order is temporarily enjoined as N&W is asking in its suit in the Western District of Virginia, some time would necessarily elapse between that order becoming final and effectuation of the inclusion of each of the three roads. Stockholder assent can hardly be obtained until the terms become certain. And further problems might arise if inclusion of D&H and B&M were prevented by lack of stockholder approval on the part of E-L or, in the case of B&M, of

either E-L or D&H. See Appendix F to Supplemental Report in F.D. No. 21510, General Terms and Conditions 1 and 2. Furthermore, as will hereafter appear, we are reserving the question how far, if we find the supplemental report and order in F.D. 21989 to be valid, we will extend the injunction during review of the inclusion order. In any event the Supreme Court's decision requires that the parties and we should make whatever sacrifice there may be in what might turn out to have been an unnecessary task of reviewing the revised Appendix G Conditions, and, as indicated, other questions remain unresolved.

We therefore set the three actions seeking to enjoin the orders in F.D. 21989 and 21990, to wit, 66 Civ. 2860, 2903 and 2914, including the complaints of intervenors, for final hearing on September 18, 1967, see F.R. Civ. P. 65(a)(2). Each plaintiff or intervening plaintiff in such actions shall file and serve on or before July 17, 1967 a supplemental complaint setting forth in what respects it objects to the order in F.D. No. 21989 as this now stands and what further relief it seeks. In the absence of good cause shown at the said hearing we intend to dismiss with prejudice the complaint of any plaintiff or intervening plaintiff which has not filed such a supplemental complaint. Responsive pleadings shall be filed and served on or before July 27. Briefs of plaintiffs and intervening plaintiffs shall be filed and served by August 8, answering briefs by August 29, and reply briefs by September 12, 1967.

II.

N&W, B&O, C&O, and Western Maryland have moved that the order entered in these actions on remand from the Supreme Court on April 28, 1967, should be modified by expanding the reference in paragraph 3 to the merger of PRR and NYC authorized by the ICC's orders in F.D. 21989, dated April 6 and September 19, 1966, so as to include the supplemental order on reconsideration served June 12, 1967. This motion must be considered in the context of the language in the same paragraph that the injunction should continue "pending the completion of the proceedings directed by the Supreme Court." The movants contend that such proceedings include not only proceedings for the judicial review of the order on reconsideration in the merger case, F.D. 21989, which we have discussed above, but also the order of the same date in the N&W inclusion proceeding, F.D. No. 21510.

Three different positions as to our duty under the Supreme Court's mandate emerge from the briefs and argument. The movants' position, supported in considerable degree by the United States, is that the injunction must remain in effect until every phase of the orders in both dockets has been finally passed upon by the Supreme Court.[4] At the other end of the spectrum the Interstate Commerce Commission, the State of New York, PRR and NYC, and the Trustees of the New Haven (NH) contend that the Court's only *mandate* was to enjoin consummation until the *Commission* had finished its work in the two cases which the Court out-

[4]Counsel for the United States reserved judgment on whether the injunction would have to continue during litigation only on the *terms* of inclusion; he thought "there might be some latitude" on that score.

lined, although they acknowledge our power to grant further relief on a proper showing and on conditions designed to insure the greatest possible expedition.[5] E-L and D&H seem to suggest a midway position, that although the Court expected an injunction during further judicial review of both orders, this was dependent on the achievement of expedition.

All these positions find some support in the majority opinion of the Court. The I.C.C. and others joining with it emphasize the Court's narrow statement of its holding, "We hold only that under the uncontradicted findings of the Commission it was necessary for it to conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger," and its equally narrow definition of the "sole question before it," 386 U.S. at 378; another statement which we quote in the margin;[6] and the concluding direction,

> "The judgment of the District Court is reversed and the cause is remanded with instructions that it be remanded to the Commission for further proceedings not inconsistent with this opinion." 386 U.S. at 392.

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[5]It may be that the Trustees of NH do not join in the acknowledgement.

[6]"In view of the patent invalidity of the order permitting immediate consummation of the merger and in light of the present status of the litigation before the Commission, we can only conclude that it is necessary that the decision as to the future of the protected railroads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger. This is especially true since the findings and recommendations of Commissioner Webb, as to the inclusion of the three protected railroads, are now under submission to the full Commission and a decision should be reached thereon by July or August 1967, we are advised by counsel. This short time would have little effect upon the ultimate consummation of the merger—which has been in the making for some 10 years now—and if it resulted in the future of the protected railroads being finally decided, serious losses to them would be obviated." 386 U.S. at 390.

The parties favoring a broader injunction point in contrast to another passage which we quote in the margin[7] and, more particularly, to the third sentence.[8] Some of the opponents respond with the Court's remark that the N&W had "indicated its acquiescence" to inclusion of the three roads, 386 U.S. at 383, and argue that whatever the Court may have said about review of an inclusion order was predicated on the assumption that N&W would not challenge the basic validity of such an order (as distinguished from the financial terms) as it has now done. N&W denies this, it says it only indicated acquiescence in an inclusion order upheld on judicial review, see 324 I.C.C. at 28, 148.

We find it unnecessary to decide among these contentions at the present time. Enough has already transpired to suggest that, even with a far greater degree of cooperation in carrying out the Supreme Court's instructions than has thus far been manifested, finalization of the inclusion order may prove a much longer and more complicated task than the majority anticipated. In addition to N&W's basic attack on the order, none of the four affected carriers except E-L is satisfied with

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[7] ". . . We note and give weight to the estimates of the Commission that the inclusion proceedings of the three roads in the N&W should be concluded in a 'relatively short time.' Our remand should, therefore, entail only a very short delay before the Commission. If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties. After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation." 386 U.S. at 392.

[8] They also stress the language in the passage quoted in fn. 6 as to "the future of the protected railroads being finally decided."

the financial terms. There is also the possibility, already mentioned, that once these are finally set, rejection by E-L's stockholders would prevent inclusion of D&H and B&M, and rejection by D&H's would prevent the B&M's inclusion; a carrier suffering non-inclusion in N&W as a result of rejection by the stockholders of another would then be entitled to seek inclusion in the PRR-NYC system, with more hearings before the Commission and further judicial review. All this could take years. We do not read the Supreme Court's opinion as directing us here and now to issue an injunction for so long a period, which might have such serious consequences not only to the PRR and NYC and the public served by them but also to NH and the four states heavily dependent upon its service.

On the other hand we do not believe it would be proper to permit consummation of the merger without our hearing and determining objections to the supplemental order in the merger case, F.D. 21989, itself. Enjoining consummation until that time will truly involve a relatively short delay; indeed, if petitions for reconsideration filed in the inclusion case, F.D. 21510, should lead the Commission to postpone the effective date of the order in the merger case, as to which we make no suggestion, there might be none at all. By the time we decide these actions in the early fall many things may be clearer than they now are. If we should determine that the revised protective conditions are satisfactory or require only minor modification and that the order is valid in all other respects, we would have seriously to consider whether the injunction should continue and, if so, how long, to what extent, and on what terms. In this connection attention would have to be given to the Court's observation "that should the immediate con-

summation of the merger be permitted and at a later date *neither* the interim conditions *nor* the inclusion proceedings be disposed of favorably to the continued existence of the merger, the only remedy remaining would be to set it aside and unscramble the consolidation." 386 U.S. at 391 (Emphasis supplied). This could well mean that once the propriety of the protective conditions was established, the merger might be allowed to be consummated and perhaps should be if the balance of interests suggested. On the other hand, if we should find the revised protective conditions invalid or the order unsound in other important particulars, a further injunction would doubtless be required.

We therefore modify paragraph 3 of our order of April 28, 1967, to read:

> "3. The orders of the Interstate Commerce Commission entered on April 6 and September 19, 1966, and served June 12, 1967, insofar as they authorize immediate consummation of the merger between the Pennsylvania Railroad Company and the New York Central Railroad Company are enjoined pending the final determination of these actions by this Court and thereafter for such further time, if any, and to such extent and on such terms as this Court may then direct. The period of 180 days fixed by the Commission in its order served June 12, 1967 for exercising the authority there conferred shall not begin to run so long as such injunction remains in effect."

In order to expedite determination whether a further injunction should be issued in our decision in the fall, all parties seeking such relief shall file and serve applications supported by appropriate affidavits and briefs not later than September 5, 1967; opposing affidavits and briefs

shall be filed and served not later than September 14. We shall expect such affidavits to inform us as to the then status and future time-table of proceedings for review of the inclusion order (including the possibility of separate and expedited determination of the validity of the direction for inclusion, as distinguished from the terms); the grounds asserted for invalidating that order in whole or in part and the answers thereto; the views of the three protected roads and the United States whether and why a further injunction is needed;[9] the representations made to the Supreme Court as to judicial review of an inclusion order and of N&W's acquiescence in such an order; the then status of proceedings for the inclusion of NH in the PRR-NYC system and of the reorganization of NH under § 77 of the Bankruptcy Act; and any other relevant facts. We shall set a time for argument on such applications at the hearing heretofore directed.

[9]We emphasize this since no injunction of the merger pending review of the inclusion order would seem to be justified in the interest of the N&W, and still less in that of the B&O, C&O or Western Maryland, which have joined in its motion; the interests that would justify a further injunction would be those of E-L, D&H and B&M and the communities they serve.

The Clerk shall enter this as an order.

/s/ HENRY J. FRIENDLY

U.S.C.J.

/s/ EDWARD WEINFELD

U.S.D.J.

/s/ RICHARD H. LEVET

U.S.D.J.

3 July, 1967.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

THE DELAWARE AND HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON, BOROUGH OF FREEDOM, and BOSTON AND MAINE R.R. CO.,

Intervening Plaintiffs,

PENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,

Intervening Defendants.

66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, and NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

WESTERN MARYLAND RAILWAY COMPANY,

Intervening Plaintiff.

66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Intervening Plaintiff,

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,

Intervening Defendants.

(Parties continued on inside cover)

OPINION

67 Civ. 2451

THE DELAWARE AND HUDSON RAILROAD CORPORATION and NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

BOSTON AND MAINE CORPORATION, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AID ASSOCIATION FOR LUTHERANS, and WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Intervening Plaintiffs,

INTERSTATE COMMERCE COMMISSION and ERIE-LACKAWANNA RAILROAD COMPANY,

Intervening Defendants.

Heard September 18 and 28, 1967 before
FRIENDLY, *Circuit Judge* and
WEINFELD and LEVET, *District Judges.*

CRAVATH, SWAINE & MOORE, by Thomas D. Barr, and ALEXANDER & GREEN, *for Erie-Lackawanna R.R.*

NIXON, MUDGE, ROSE, GUTHRIE, ALEXANDER & MITCHELL, by Harry G. Silleck, Jr., *for Delaware & Hudson R.R.*

SIDLEY & AUSTIN, by Howard J. Trienens and George Saunders, KELLEY, DRYE, NEWHALL, MAGINNES & WARREN, by Frank B. Heiss, WILMER, CUTLER & PICKERING, and WHEELER & WHEELER, *for Norfolk & Western Ry., Baltimore & Ohio R.R., Chesapeake & Ohio Ry. and Western Maryland Ry.*

MACKLIN, HANAN & McKERNAN, by Timothy A. Hanan, and William P. Quinn, *for Reading Company.*

HOGAN & HARTSON, by Edward A. McDermott and James A. Belson, and Richard C. Casey, *for Boston & Maine R.R.*

WINDSOR F. COUSINS, and CONBOY, HEWITT, O'BRIEN & BOARDMAN, by Edward F. Butler, Hubert L. Brinsmade and David J. Mountain, Jr., *for Pennsylvania R.R.*

JAMES B. GRAY and JEROME H. SHAPIRO, *for New York Central R.R.*

SULLIVAN & WORCESTER, by Joseph Auerbach, and James Wm. Moore and Robert M. Peet, *for Richard Joyce Smith and William J. Kirk.*

WILLIAM G. MAHONEY, and REILLY, CURRY & GIBBONS, by Paul G. Reilly, Jr., *for Railway Labor Executives Association.*

DONOVAN, LEISURE, NEWTON & IRVINE, by Malcolm Fooshee and Granville Whittlesey, Jr., *for John Hancock Mutual Life Ins. Co., Prudential Ins. Co. of Amer., Aid Ass'n for Lutherans, and Woodmen of the World Life Ins. Soc.*

MYRON S. ISAACS, *for Oscar Gruss & Son.*

MIGDAL, LOW, TENNEY & GLASS, by Lester G. Migdal and Lawrence W. Pollack, *for New Haven First Mortgage Bondholders Committee.*

ROBERT W. GINNANE, LEONARD S. GOODMAN, BETTY JO CHRISTIAN and FRITZ R. KAHN, *for Interstate Commerce Commission.*

HOWARD E. SHAPIRO, JOEL A. FORKOSCH and MICHAEL D. HESS, *for United States of America.*

ARTHUR A. ARSHAM and GORDON P. MacDOUGALL, *for City of Scranton and Milton J. Shapp.*

WALTER J. MYSKOWSKI, *for State of New York.*

ROBERT M. SCHACHT, *for State of Rhode Island.*

LEON S. WOLK, *for State of New Jersey.*

SAMUEL KANELL, *for State of Connecticut.*

EDWARD J. HANLEY, *for Commonwealth of Massachusetts.*

JOHN R. THOMPSON, *for City of New York.*

ALAN J. LITTAU, *for Port of New York Authority.*

United States District Court

SOUTHERN DISTRICT OF NEW YORK

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66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

HE DELAWARE AND HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON and BOROUGH OF FREEDOM, and BOSTON AND MAINE R.R. CO.,

Intervening Plaintiffs,

ENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,

Intervening Defendants.

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66 Civ. 2903

HE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

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66 Civ. 2914

HE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant,

WESTERN MARYLAND RAILWAY COMPANY,

Intervening Plaintiff.

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66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

HE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Intervening Plaintiff,

HE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,

Intervening Defendants.

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67 Civ. 2451

THE DELAWARE AND HUDSON RAILROAD CORPORATION, and NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiff

—v.—

UNITED STATES OF AMERICA,

Defendan

BOSTON AND MAINE CORPORATION, JOHN HANCOCK MUTUAL LIFE INSURANC COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AID A SOCIATION FOR LUTHERANS, and WOODMEN OF THE WORLD LIFE INSU ANCE SOCIETY,

Intervening Plaintif

INTERSTATE COMMERCE COMMISSION, ERIE-LACKAWANNA RAILROAD COMPANY,

Intervening Defendan

Heard September 18 and 28, 1967 before
FRIENDLY, *Circuit Judge* and
WEINFELD and LEVET, *District Judges.*

OPINION

FRIENDLY, *Circuit Judge:*

We have before us, on final hearing, actions to enjoin the enforcement of orders of the Interstate Commerce Commission in F. D. 21989 and 21990, see 327 I. C. C. 475, 328 I. C. C. 304, and 330 I. C. C. 328, authorizing the merger of Pennsylvania Railroad Company (PRR) and New York Central Railroad Company (NYC) into a single company (Penn-Central), and in F. D. 21510, see 330 I. C. C. 780 and 331 I. C. C. 22, directing the Norfolk & Western Railway System (N & W) to include Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D & H) and the Boston & Maine Corporation (B & M) on terms therein specified. The orders come before us as a result of three separate actions or sets of them. The first set, sometimes hereafter referred to as the merger actions, consists of three suits, 66 Civ. 2860, 2903 and 2914, attacking the orders in F. D. 21989 and 21990.[1]

1 The first of these was brought by E-L, D & H, and B & M. Chicago and Eastern Illinois R.R. Co., Milton J. Shapp, the City of Scranton,

A year ago we denied temporary injunctions in these suits, Judge Weinfeld dissenting on the ground that the Commission had not finalized the "Appendix G conditions" for the protection of E-L, D & H and B & M, 259 F. Supp. 964 (S. D. N. Y. 1966), and were subsequently reversed by a closely divided Supreme Court, 386 U. S. 372 (1967). In a supplemental report, served June 12, 1967, the Commission revised and completed the Appendix G conditions; on September 11, 1967, the Commission denied petitions for further reconsideration but on August 3 and September 12 it modified its order with respect to the New York, New Haven & Hartford Railroad Company (NH) in certain respects discussed below. The second action, sometimes hereafter referred to as the New Haven action, 66 Civ. 3413, addressed to orders in the same docket, was brought by Oscar Gruss & Son, a large holder of the New Haven's First and Refunding Mortgage Bonds, and a committee representing other holders of such bonds intervened. We dismissed the complaint, as well as a separate action by the committee, 66 Civ. 3425, primarily for lack of standing, 261 F. Supp. 386 (S. D. N. Y. 1966), but the Supreme Court vacated our order on Gruss' appeal, 386 U. S. 776 (1967), and remanded for further consideration. The third action, 67 Civ. 2451, sometimes hereafter referred to as the inclusion action, was brought by D & H to review the order in F. D. 21510 as this affected it;[2] B & M and four

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the City of Jersey City, and the Borough of Freedom intervened as plaintiffs. The second was brought by The Baltimore & Ohio R.R. Co. (B & O), The Chesapeake & Ohio R.R. Co. (C & O), and the N & W. The third was brought by the Central Railroad of New Jersey (CNJ) and The Reading Company; Western Maryland Railway intervened as a plaintiff.

2 By orders dated August 10 and September 1, 1967, the Commission modified its order to meet objections of the D & H; in the former it also denied petitions for reconsideration by B & M and N & W.

life insurance companies holding large amounts of E-L's bonds intervened as plaintiffs and, on motion of the United States and the Interstate Commerce Commission, we directed that N & W be joined as a plaintiff. E-L intervened as a defendant and all four roads affected by the inclusion order are thus parties. Because of the close relation among all three actions, we think it best to dispose of them in a single opinion despite the length which the number of issues necessarily entails.

We shall not here detail the procedural history whereby the threat that these related orders would become the subject of litigation in six or more different district courts has seemingly been averted and all issues concentrated in a single court of first instance. This can be found in our orders of July 3 and July 26, 1967, the orders of the District Court for the Middle District of Pennsylvania dated July 11 and 27, 1967, and the orders of the District Court for the Western District of Virginia dated July 14 and September 11, 1967. Suffice it to say at this point that in our view the proceedings reflect credit on the sober second thought of most counsel and, even more so, on the restraint of the "disciplined and experienced judges," see *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 184 (1952), of the Third and Fourth Circuits, who have demonstrated that even the long out-moded machinery for review of orders of the Interstate Commerce Commission by suit before a three-judge district court can be made to work, although with creaks and strains that ought to be eliminated.

We have said "seemingly averted" because N & W continues to challenge the power of this court to entertain the inclusion action or at least to join it as a plaintiff. Relying on a passage in our order granting the motion for joinder,

wherein we said that this "shall not prejudice any contention the N & W may wish to make in any court that the Western District of Virginia is the appropriate forum for review of the inclusion order," N & W seeks to reargue the venue issue we there decided against it. Mere reading of the passage shows that it was not intended to give N & W permission to reargue after the normal time for seeking this had passed; we wished only to make clear that the joinder of N & W in the action in this district relating to the inclusion order should not preclude argument that, assuming that either this court or the Virginia court could lawfully proceed, the ends of justice would be better served by having the inclusion order reviewed by the latter. N & W now scarcely argues that point, whose lack of merit this opinion will make abundantly clear, and the orders of the Virginia court indicate its agreement that the merger and inclusion actions are so intertwined that they should be initially reviewed by the same court. Nevertheless, because of the importance of avoiding any procedural defect in these proceedings, we have reconsidered N & W's arguments.

We may accept *arguendo*, without however deciding, that, as N & W urges, D & H does not have its "residence or principal office" here within the meaning of 28 U. S. C. §1398(a) since its complaint fixes its principal place of business in Albany in the Northern District of New York, although it is a New York corporation and does business in the Southern District.[3] Concededly none of the intervening plaintiffs has its residence or principal office here. Nevertheless, since 28 U. S. C. §1398(a) goes to venue and not to jurisdiction,

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3 While it has been generally held that a corporation "resides" only in the district of the chartering state where its principal office is located, *Galveston, H. & S. A. Ry.* v. *Gonzales*, 151 U. S. 496 (1894); *Wood* v. *Delaware & H. R.R.*, 63 F. 2d 235 (2 Cir. 1933), it is arguable that a different result should follow under 28 U. S. C. §1398(a) which

joinder is authorized by the first sentence of amended Rule 19(a). Whereas former Rule 19(b) permitted compulsory joinder only of parties "subject to the jurisdiction of the court as to both service of process and venue," the new Rule 19(a) allows joinder of "a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action" subject to his entitlement to dismissal when his joinder "would render the venue of the action improper." The amendment, which has been characterized as "a restructuring of major proportions," see 2 Barron & Holtzoff, Federal Practice & Procedure §511 (1966 pocket part), could hardly have a more suitable application than when one party (N & W) claims an order of the Interstate Commerce Commission to be too favorable to all the others, one of the latter contends it is not sufficiently so, and still others say it is just right. There remains the contention based on the last sentence of the Rule.[4] The letter of this does not cover N & W. If venue were ever improper, it was because D & H has its principal office in Albany rather than in New York City, and that defect, if it were one, see fn. 3, was waived by the United States. Adding N & W as a party plaintiff did not make the alleged defect more serious—*its* joinder did not "render the venue of the action improper" within the language of the Rule.

We see no reason for expanding on the letter under the circumstances of this case. The last sentence of Rule 19(a) seems to have been framed in the light of the then require-

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permits it to sue either in the district of its residence or in that of its principal office since the usual construction would make the alternative illusory in the common case where the principal office is in the incorporating state. However, we find it unnecessary to pass upon this.

4 "If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

ment that in diversity actions all plaintiffs or all defendants reside in the district, and the requirement that in all other cases, save as otherwise provided, all defendants so reside, 28 U. S. C. §§1391(a) and (b). Evidently it was thought anomalous and perhaps contrary to the will of Congress as expressed in those sections that compulsory joinder should lie when the party joined could not initially have joined as a plaintiff or been joined as a defendant without provoking a valid venue objection. But there is nothing anomalous or contrary to the intent of 28 U. S. C. §1398(a) in joining N & W in the instant case. N & W's presence as an additional plaintiff does not give rise to a new venue objection as it would under a provision like that in 28 U. S. C. §1391(a) requiring that *all* plaintiffs reside in the district. Indeed the typical action by railroads to enjoin important orders of the Interstate Commerce Commission includes plaintiffs residing or having their principal office in many states, as witness the plethora of multi-plaintiff actions bearing the names of the Abilene & Southern, the Akron, Canton & Youngstown and the Ann Arbor.[5] Both the present statute and its predecessor, 38 Stat. 219-20 (1913), recognized that in such matters the presence of one plaintiff for whom venue was proper suffices for all and process may then be served throughout the United States, 28 U. S. C. §2321. If one railroad has chosen to sue in a venue to which objection could have been taken but the United States as sole named defendant does not object, no policy is served by allowing another railroad complaining of the order to do so. See *Hoiness* v. *United States*, 335 U. S. 297 (1948). This court having been seized of the action, it is immaterial that, as a result of the Com-

5 It is worth noting that neither N & W nor its allies in the action brought by them to enjoin the merger order, 66 Civ. 2903, resided or had their principal office in the Southern District of New York.

mission's decisions on reconsideration, 331 I. C. C. 22, D & H no longer complains of the inclusion order; the action continues for disposition of the complaints of the intervening plaintiffs and of N & W.

I. The Merger Actions

The only parties who have ever challenged in this court the Commission's basic finding that the Penn-Central merger is in the public interest were intervening plaintiffs Milton J. Shapp, the City of Scranton and the Borough of Freedom. After the Commission had entered its supplemental order served June 12, 1967, the Borough of Moosic brought an action in the District Court for the Middle District of Pennsylvania to enjoin the merger. Shapp and the City of Scranton intervened therein and the City of Pottsville applied for intervention; we are advised that the Borough of Moosic was represented by the same attorneys who appeared here for Shapp and the City of Scranton and that the complaint was substantially the same as that heretofore presented in this court. On July 11, the District Court for the Middle District of Pennsylvania stayed proceedings before it until October 1. Shapp and the City of Scranton moved to stay proceedings on their intervening complaints here or, in the alternative, to permit their dismissal without prejudice. In our order of July 26, 1967, we denied these motions but extended the time fixed for these intervenors to file a supplemental complaint; we also stated that we would permit the Borough of Moosic and the City of Pottsville to intervene. They did not accept the invitation, and Shapp and the City of Scranton failed to file supplemental complaints or further briefs as directed by our orders. The United States and the Interstate Commerce Commission have moved pursuant to F. R. Civ. P. 41(b) that we dismiss the complaints of Shapp and the City

of Scranton with prejudice for want of prosecution; PRR and NYC join in the motion. For reasons indicated in our previous orders we are wholly unpersuaded by the intervenors' contentions that their applications here were of limited scope and they should now be free to withdraw and challenge the merger orders in another court of their own choosing. Their case therefore falls within the ordinary rule that the claim of a litigant who refuses to file an amended or supplemental complaint or to comply with other lawful procedural orders of the court will be dismissed with prejudice. We therefore grant the motion for such dismissal.[6]

Chicago & Eastern Illinois Railroad Company has moved for dismissal of its intervening complaint with prejudice and we have granted that motion. We have also granted the unopposed motion of PRR and NYC for dismissal with prejudice of the intervening complaints of the parties listed in the margin[7] who have failed to file supplemental complaints or briefs as directed by our order of July 3.

The posture of the actions has changed in several other respects. The Trustees of CNJ, which has invoked §77 of the Bankruptcy Act since the case was previously here,

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6 While we entertain no doubt of the sufficiency of this ground, we think it well to add that, apart from any question as to standing, we find no merit in the complaints of Shapp and The City of Scranton. Much of their objection was directed against the portion of the order permitting E-L, D & H and B & M to petition in certain eventualities for inclusion in Penn-Central, but these roads could not be included in Penn-Central except on a finding that such inclusion was in the public interest and this would be subject to judicial review. The criticism that the Commission did not give adequate weight to the improved earnings of PRR and NYC during the course of the merger proceedings has been shattered by the results for the first half of 1967. Beyond this the attacks simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission.

7 City of Hoboken; City of Union City; Township of North Bergen; Town of West New York; Township of Weehawken; City of Jersey City; Borough of Freedom.

sought and were granted dispensation from the schedule for supplemental complaints, briefs and argument on their stipulation that, while reserving the right to assert that the order of the Commission should contain protective conditions for the benefit of CNJ, "they will not assert in any Court any claim that the Penn-Central merger should be delayed for any reason" or that the Appendix G conditions in favor of other carriers should be set aside. B & M has changed its position from opposition to support of immediate consummation of the Penn-Central merger. Finally, E-L and D & H now make no objection to the revised Appendix G conditions; they seek a further injunction only because the Commission failed to reserve jurisdiction to require Penn-Central to pay a capital loss indemnity and because it has authorized immediate consummation of the merger without completion of judicial review.

The Appendix G Conditions.

While the three protected roads make no objection to the Appendix G traffic and current indemnity conditions, these continue to be the object of sharp criticism from N & W and the three roads, C & O, B & O and Western Maryland, making common cause with it. The specific claims are that the revenue indemnity conditions create a pooling agreement in defiance of §5(1) of the Interstate Commerce Act; that they will unwarrantably injure the unprotected roads; and that there is no substantial evidence of the merger's being in the public interest so long as the Appendix G conditions remain in effect. We find these contentions without merit.

Section 5(1) makes it unlawful for any common carrier subject to chapters 1, 8 and 12 of the Interstate Commerce Act to "enter into any contract, agreement, or combination

'among carriers' for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof" unless the Commission finds that such pooling or division "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition." In its report on reconsideration of September 16, 1966, the Commission held that the Appendix G conditions were not within §5(1) since they did not constitute a contract, agreement or combination entered into by the carriers involved and, less forcefully, that in any event §5(2)(b) authorized it to approve a merger on such terms and conditions as it found "just and reasonable" even if these would otherwise violate some other prohibition of the Act, 328 I. C. C. at 326.[8] In a footnote to its supplemental report the Commission reiterated the former position but added that even if the revenue indemnification "constituted pooling within the meaning of section 5(1), this record clearly supports findings as required by that subsection, i.e., that to protect these carriers clearly is in the interest of better service to the public" and "will not unduly restrain competition." 330 I. C. C. at 345 n. 8.

We agree that financial indemnification to weaker railroads prescribed by a governmental agency as a condition to approval of a merger is not within the fair intendment

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8 While we find it unnecessary to pass upon this ground, the authority cited in the Commission's brief, *Atlantic Coast Line R.R.* v. *United States*, 284 U. S. 288 (1932), is inapposite. The Court there held that §5(2) permitted the Commission to condition its approval of a lease on the lessee's agreement to establish a through route that would short-haul itself although §15(4) would have prevented the Commission from compelling this absent an application under §5. There is a rather obvious distinction between a limitation on the power of the Commission such as §15(4) and a declaration of illegality such as §5(1). See *Chicago & N. W. Ry.* v. *Peoria & Pekin Ry.*, 319 F. 2d 117, 122 (7 Cir. 1963), in which the Court of Appeals held that approval of a pooling agreement under §5(2) in an earlier proceeding did not satisfy the requirements of §5(1).

of §5(1) even though indemnification becomes effective only by the indemnitor's accepting the provisions as a condition to consummating the merger. While the construction urged by plaintiffs would, to say the least, be pressing language to its utmost bounds, we need not decide whether this reading would fall within or without the limit to which the words can be pushed. "This is not the way to read such legislation. It is true also of Acts of Congress that 'The letter killeth.'" *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 548 (1950) (dissenting opinion of Mr. Justice Frankfurter). Section 5(1) of the Interstate Commerce Act has been with us for a long time. Its lineage goes back to the original Act of 1887, §5 of which made it unlawful for any common carrier subject to the Act "to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of such railroads, or any portion thereof . . . ," 24 Stat. 380, and the evil at which it is aimed remains the same. "The mischief and defect for which the common law did not provide," Heydon's Case, 3 Co. 72 (1584), consisted in truly consensual arrangements between carriers giving each an incentive to raise rates to the highest point and reduce service to the lowest point the traffic would bear. The framers of §5 were acting against cartels; their words cannot fairly be used to invalidate a provision developed by the Commission, which then had no power to do so, to compel a stronger road to pay a portion of its revenues to weaker ones in order to enable the latter better to compete.[9]

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9 Alternatively we see no reason why footnote 8 to the supplemental report, 330 I. C. C. at 345, does not meet the requirement of §5(1). The footnote is not to be considered alone, as N & W and its allies propose, but along with the extensive discussion of the Appendix G

The contention that the financial indemnity will injure N & W and other unprotected carriers rests on the theory, described in our previous opinion, 259 F. Supp. at 970, that the indemnity formula gives the protected carriers an abnormal incentive to throw interline traffic to Penn-Central rather than to the unprotected lines in order to increase the "standard revenue" of the protected carriers for a future year, and Penn-Central an abnormal incentive to throw such traffic to the protected carriers rather than to others in order to increase the formers' "earned revenue." After taking much evidence and engaging in extensive discussion, 330 I. C. C. at 353-56, the Commission found the contention unproved. While the studies submitted by the unprotected roads showed considerable amounts of traffic susceptible to diversion of the sort indicated, the Commission found that neither the protected roads nor Penn-Central would have either the motive or the ability to engage in such diversion on any substantial scale. The Commission nevertheless included in its findings "a provision that would prohibit the protected carriers from engaging in manipulation, with sanctions if they do" and reserved jurisdiction to reopen the proceedings in the event of such manipulation and modify Appendix G accordingly, 330 I. C. C. at 355.

Forecasting the future ability and desire of railroads to effect diversion is peculiarly a matter for the expert judgment of the "tribunal appointed by law and informed by experience." *Illinois Central R.R.* v. *I. C. C.*, 206 U. S. 441,

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conditions in all three reports. When these are read in their entirety, they amply support findings that the financial indemnity provisions "will be in the interest of better service to the public" by preserving the viability of the three protected roads and that, in view of their limited and temporary character, the Commission's power to revise them, and the other considerations outlined in the Supplemental Report, 330 I. C. C. at 351-52, they will not "unduly restrain competition."

454 (1907). Almost all N & W's contentions on this subject simply reflect disagreement with conclusions which the evidence warranted the Commission in reaching and are thus beyond our power to review. There is only one possible exception. While the Commission found that the protected roads had no power to divert traffic in the interim covered by Appendix G, it held in the *Inclusion* case that the roads could divert traffic to N & W after their inclusion. N & W claims that the two findings contradict one another. The claim is readily answered. Once integrated into N & W, the protected roads will be able to offer shippers more efficient service. Under present conditions, however, shippers will gain little or nothing by permitting the protected roads to divert their traffic to Penn-Central. The position of these three lines as a permanent part of a strong N & W system will be altogether different from their present status. Moreover we see no reason to doubt the efficacy of the Commission's reservation of jurisdiction to take action against manipulation.[10]

We are similarly unpersuaded by N & W's contention that the Commission did not find, or in any event had no evidentiary basis for finding, that consummation of the merger under the Appendix G conditions would be in the public interest. Such a finding is implicit in the very con-

10 N & W and its allies contend they will be precluded from obtaining judicial review of denial of any complaints they may make on the score of manipulation, since paragraph 5A of Appendix G provides that "All controversies arising under the appendix shall be determined with finality by the Interstate Commerce Commission," whose orders thereunder "shall not be reviewable in any court." The Commission says this is limited to controversies as to the application of Appendix G between Penn-Central and the three protected lines and not to action taken or refused under the reservation of jurisdiction on the score of manipulation. This is surely a permissible reading—indeed in our view the natural one. In any event we accept the Commission's statement as a binding representation to that effect. *Cf. American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 241 (1936).

cept of devising conditions permitting consummation prior to actual inclusion of the protected roads in a major system and was made explicit when the Commission said that only "some of the merger benefits" would be prevented and that the conditions would not work "an undue hardship upon applicants either in their operations or merger implementation." 327 I. C. C. at 532; see also 330 I. C. C. at 361. To deny evidentiary basis for this finding would defy common sense. An end to the uncertainty that has plagued the applicant roads for five and a half years would be enough. Nothing in Appendix G prevents the realignment of management, the elimination of many duplications in personnel, the undertaking of financing, or the refurbishing and, in many cases, the implementation of plans for better and more economical service. The Appendix G conditions impose no restrictions on activities concerning routes not competitive with the three protected lines; there are enough of these to absorb the energies of Penn-Central's management for some time. Beyond all these considerations early consummation of the merger not only will benefit the New Haven but is necessary to its survival. For, as will appear later, that road's condition has become far graver than when this case was last before us or the Supreme Court.

Capital Loss Indemnity.

E-L, D & H, and N & W and its allies complain of the Commission's refusal, 330 I. C. C. at 359-60, to prescribe "capital loss indemnification" for any decrease in the price payable to the protected roads due to diversion of traffic to Penn-Central, whether before or after inclusion in a larger system, or even to reserve jurisdiction to do so. The Commission justified this on the basis that under its decision in the *Inclusion* case there would be no such decrease, 330

I. C. C. at 360. While E-L and D & H endorse that conclusion, they nevertheless claim that the failure to reserve jurisdiction on the capital loss issue was error. They fear that if N & W's objections to the inclusion provisions should be sustained either here or ultimately by the Supreme Court, it may be impossible for the Commission to devise equitable terms for their inclusion in N & W without Penn-Central paying a capital indemnity. Since E-L and D & H assert they cannot fairly be asked to accept a reduction in the sales price as a result of losses inflicted by the merged Penn-Central and N & W says it cannot be asked to pay more than the roads are worth in light of the Penn-Central merger, Penn-Central, it is contended, must be required to pay for the loss it has caused the protected roads and the Commission should have reserved jurisdiction to that end so that the legality of such a position could be determined before the merger was consummated.

So far as the fears of E-L and D & H relate to action by this court, they are mooted by our decision in the *Inclusion* case. For reasons stated in section IV of this opinion we doubt that any decision of the Supreme Court will demand downward revision of the terms. Moreover, we are not at all sure, for reasons developed in our discussion of the *Inclusion* case, that the Court or the Commission on a remand would subscribe to the view that N & W can only be required to pay a sum which takes account of post-Penn-Central-merger losses, or—for that matter—would accept the view of E-L and D & H that the Interstate Commerce Act requires them to be compensated for any decrease in price resulting from such losses. On the other hand we have little doubt that if PRR and NYC elect to consummate the merger before a final disposition by the

Supreme Court, they take their chances as to any further conditions with respect to capital loss indemnity that the Court might direct the Commission to impose. While we would not have disapproved the reservation of jurisdiction which E-L and D & H advocate, we shall not direct the Commission to amend its order as they request.

N & W claims that a capital indemnity is needed even if, as it disputes, the Commission's finding that post-inclusion losses do not require a lower price should be affirmed. It says that while the Appendix G conditions may make the three roads substantially whole for traffic diverted to Penn-Central during the protected period, traffic once diverted to so powerful a competitor is not readily regained. The roads will therefore be worth less to N & W at the time of inclusion than if inclusion could be effected simultaneously with Penn-Central consummation, and Penn-Central must be required to pay the difference. Apart from our unwillingness to commit ourselves to the legal premise on which this argument necessarily rests, N & W's fears are factually unsupported.

There is no support for N & W's contention that despite the highly restrictive Appendix G traffic conditions, which, as we said a year ago, "go far beyond anything in previous history," 259 F. Supp. at 976-77 and see n. 10, Penn-Central will be able to divert a significant amount of traffic during the interim period. The figure of $16,300,000 in revenues, which the Commission estimated Penn-Central might divert from these roads after their inclusion in N & W, when it is no longer shackled by Appendix G, obviously is totally unrelated to what it can divert under the Appendix G traffic conditions. Indeed the contention is in sharp contrast to N & W's claim, discussed above, that these conditions

so restrict Penn-Central as to strip the merger of all public interest so long as they exist. There is also the impressive testimony, recounted in our previous opinion, 259 F. Supp. at 977-78, that even apart from the protective conditions, some time would elapse before diversionary effects on the protected roads would occur. This is of particular importance if, as now seems likely, the protected period will be short.

We also find no force in N & W's final argument that the order in the merger case was defective because it did not affirmatively find that the only proper home for the three roads is in N & W or N & W-C & O-B & O and not in Penn-Central, but provided instead that the roads might seek inclusion in Penn-Central in certain contingencies. While the Commission's decision in the *Inclusion* case made clear where it thought the proper home to be, 330 I. C. C. at 796, we see no reason why it was bound absolutely to exclude Penn-Central as an alternative, particularly in light of the then existing possibility that refusal of the stockholders of E-L to accept the inclusion terms would prevent inclusion of D & H or B & M in N & W, and the still existing although unlikely one that refusal by D & H's stockholders would prevent inclusion of B & M. N & W is fully protected by its right to oppose inclusion of any of the three roads in Penn-Central.

Complaint of the Reading.

The merger case presents only one more issue that requires discussion, other than that relating to the authorization of immediate consummation which we reserve for the final section of this opinion. Reading complains that it was not allowed to show the injuries it would suffer from the Penn-Central merger as such. It claims that these

would be so extensive as to entitle it to protective conditions similar to those provided in Appendix G for E-L, D & H and B & M, and seeks a remand to that end.

Reading has long been regarded as a "family line" of the B & O, affording along with CNJ that system's access to the metropolitan New York area. Some 38% of its stock is owned by B & O and another 10% is held by Otis & Co. subject to a first refusal by C & O. Five of its eleven directors are B & O nominees, and three other "public" directors were on the management slate. Several of its officers are former B & O employees whose salary continues to be paid by B & O to maintain their pension rights (although B & O is reimbursed by Reading) or hold office jointly in the two roads.

Reading intervened before the Commission in the merger proceeding in August 1962. In April 1963 it advised the Commission that it would not oppose the merger if the Commission would impose standard routing and gateway conditions and PRR was required to divest its holdings in N & W. It introduced no evidence of possible diversion. However, in response to an inquiry from the Commonwealth of Pennsylvania which was conducting an investigation of the effect of the merger on railroads serving the state, the President of the Reading wrote a letter that was subsequently received in evidence. This stated that in 1961 Reading handled a total of 1,116,000 carloads; that 122,000 carloads were interchanged with NYC at Newberry Junction and another 10,000 cars were handled with NYC via an intermediate carrier; that the Reading thought it "possible that as much as 25% of the shipments thus interchanged would be diverted";[11] and that the study did not

11 This constitutes 3% of Reading's total carloads. Counsel advised us that Reading would lose $2,700,000 in revenue if its prediction is realized, assuming that the cars diverted yielded average revenues.

include traffic interchanged with PRR since "the Pennsylvania would now be handling it if this were physically feasible." The Examiners found that "the net effect [of the merger] will not be detrimental" to Reading or to its "ability to provide a general transportation service to the public" and the Commission adopted these findings in its initial report, 327 I. C. C. at 481-82.

After the Commission had issued its Report, Reading sought reconsideration arguing that the finding was inconsistent with another statement of the Examiners that in view of the paucity of evidence they had "no way of assessing the overall implications of the proposed merger" upon Reading; it requested a further hearing to show the adverse effect of the merger in general and also of the Appendix G conditions. The Commission reworded its finding to read that "it has not been shown of record" that the merger would be detrimental to Reading or its "ability to provide a general transportation service to the public," and gave Reading leave to participate in the further hearing as to the effect of the Appendix G conditions, but denied the request to reopen the record to show general adverse effect of the merger. At the further hearing, the Examiners received a Reading exhibit seeking to prove that $3,500,000 of annual revenue would be subject to diversion because of "manipulation" of the Appendix G conditions; but the Commission rejected the conclusion for reasons we have earlier sustained. The Examiners excluded another exhibit purporting to show that up to $19,900,000 of revenue was subject to diversion as a result of the Penn-Central transaction as such. The Commission affirmed this ruling, holding the Reading to be bound by its "original concession that the effect of the merger transaction (without the indemnity conditions) . . . would be inconsequential." 330 I. C. C. at 357.

We cannot fault the Commission for this ruling. Administrative proceedings, especially of such complexity as this, would never end if parties remained free to take new positions at any time and seek to support them with evidence that had been available all along. See *United States* v. *Northern Pac. Ry.*, 288 U. S. 490, 494 (1933); *Valley Telecasting Co.* v. *F. C. C.*, 336 F. 2d 914, 917 (D. C. Cir. 1964). Reading's reliance on *Udall* v. *F. P. C.*, 387 U. S. 428 (1967), is misplaced; there the Secretary of the Interior had taken his position from the time the administrative proceeding commenced and submitted his studies as soon as these could be completed. Furthermore, the Secretary of the Interior is an especially important representative of the public—when he speaks others should try to hear him, especially when he speaks on behalf of fish, who have few other spokesmen. While Reading's assertion that the Commission is more than an umpire has its validity, this does not support the conclusion that the Commission is not warranted in taking a railroad at its word or is obliged to reopen a proceeding whenever management has a second thought. *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19, 28 (E. D. Mich.), aff'd, 375 U. S. 216 (1963). Moreover, management's initial conclusion that the effect of the merger would be inconsequential was supported by its own letter to the Commonwealth of Pennsylvania which was in evidence and the new evidence sought to be offered was scarcely persuasive.[12] If

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12 This included, in addition to the interchange with NYC, all traffic, whether interline or local, originating or terminating at a place served both by PRR and by Reading. The study did not attempt to estimate how much of the $19,900,000 of allegedly divertible traffic would in fact be diverted. It admitted, though, that the traffic most likely to be diverted was the traffic exchanged with NYC at Newberry Junction —the same traffic that Reading's President discussed in his 1962 letter to the Commonwealth of Pennsylvania.

Reading's management thought it could safely remain silent since it would be taken care of by its parents although neglecting the opportunity to bind them afforded by the C & O-B & O acquisition, 317 I. C. C. 261 (1962),[13] the Commission was also warranted in thinking so. Indeed it is still exceedingly hard to believe that B & O will see the roads affording it access to the metropolitan New York area disappear, although it naturally will do everything possible to exploit its lack of obligation to include Reading and CNJ in its own system both to minimize their commuter burden and to forward the N & W-C & O-B & O merger. If Reading's independent stockholders should ultimately be damaged by action or inaction of management dictated by B & O to further its own interest at the cost of Reading's, they are not without remedy.

II. The New Haven Action

In an opinion reported in 261 F. Supp. 386 (S. D. N. Y. 1966), we dismissed, primarily for lack of standing, the complaints of Oscar Gruss & Son, 66 Civ. 3413, and The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders' Committee, 66 Civ. 3425, to enjoin consummation of the Penn-Central merger until the properties of NH were included therein. Gruss appealed to the Supreme Court but the Committee did not. After reversing our denial of a temporary injunction of the merger in the suits brought by other railroads to that end, *Baltimore & Ohio R.R.* v. *United States*, 386 U. S. 372 (1967), the Supreme Court entered an order on Gruss' appeal providing in relevant part as follows:

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13 Reading has finally sought a commitment for interim aid by a petition for reconsideration in Chesapeake & Ohio Ry. Co.—Control—Western Maryland Ry. Co., 328 I. C. C. 684 (1967), which is still pending.

"Since the order which appellant's suit attacked is now subject to further consideration by the Commission and since proceedings to achieve inclusion of the New Haven are also under way before the Commission, it appears inappropriate to review the decision of the District Court at this time. Rather, we vacate the order of the District Court and remand the case to that court. Should appellant still be dissatisfied with the ultimate order of the Commission in the merger proceedings, it may attempt a fresh challenge in the District Court." 386 U. S. 776, 777 (1967).

After the Commission had rendered its Supplemental Report of June 12, 1967, we gave leave for the filing of supplemental complaints in the Gruss action; these repeated the prayers of the original complaint that consummation of the Penn-Central merger be enjoined pending inclusion of NH. The United States, the Interstate Commerce Commission, the Trustees of NH and PRR and NYC move for dismissal both for lack of standing[14] and on the merits.

While some progress has been made in the direction of inclusion of NH in Penn-Central by sale of its assets, the day of such inclusion is at best some time off. Commission hearings in the inclusion proceeding under §5(2) of the Interstate Commerce Act have been concluded and the case stands submitted but no report has yet been rendered. As a result of adverse intimations by the Court of Appeals for this Circuit in *Chase Manhattan Bank* v. *Smith*, 378 F. 2d 635, 638-40 (1967), the NH Trustees have abandoned their proposal to attempt to effect inclusion as a first step in a two-step plan of reorganization under §77 of the Bank-

14 They contend further that the Committee, which had also intervened as a plaintiff in the Gruss action, is barred by virtue of its failure to appeal from our previous judgment of dismissal.

ruptcy Act and have proposed a full plan, including provisions for distribution among creditors, which will require approval by the Commission and the reorganization court, submission to creditors, and either approval by them or a determination by the court to utilize the "cram-down" provisions of §77(e), before inclusion can occur. Beyond all these sources of uncertainty and delay is the possibility, adverted to by the Court of Appeals, 378 F. 2d at 639, that lack of action by NH stockholders, who have long since ceased to have any economic interest in the property, might nevertheless prevent inclusion unless the Supreme Court should follow the dissenting views of Mr. Justice Douglas and two other Justices rather than those of the four-man majority in *St. Joe Paper Co.* v. *Atlantic Coast Line,* 347 U. S. 298 (1954), or Congress should adopt corrective legislation.

Meanwhile it has become unhappily evident that events will not await the resolution of these issues. Although the NH Trustees had stopped the attrition of cash in 1963 and again, as a result of some $6,000,000 in aid from the states served by NH, in 1966, the loss of cash resumed disastrously in the early months of 1967 and has continued. In an opinion dated July 11, 1967, Judge Anderson found that NH's depletion of cash was "so serious, that if the present rate of loss continues, there will be insufficient left by late September to meet the payroll of approximately $1,400,000 per week," that if the Penn-Central merger "does not become effective shortly after September, the New Haven will be faced with a desperately critical situation," and that "it cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system." Recognizing the impropriety of the Trustees' taking any action that would be or appear to be

a repudiation of the contract which they made with PRR and NYC in good faith, he directed that they "should not oppose the immediate inclusion request by other parties in interest," noted the offer of the Trustee for the First Mortgage Bonds to present the matter to the Commission in its brief in the NH Inclusion Case, and stated his opinion "that it is very much in the interests of the Debtor's estate that this issue be so submitted." Such a suggestion was made not only by the Trustee under the First and Refunding Mortgage but by the trustees under two other mortgages, Gruss, the Committee, and the states of New York, Connecticut, Rhode Island and Massachusetts.

The Commission reacted with speed. By order served August 3, 1967, it directed the NH Trustees to negotiate a lease of NH with PRR and NYC to be "immediately available upon consummation of the Penn-Central merger"; the order also stated "that it would be inequitable during the lease period to place the entire burden of the NH operating deficit upon Penn-Central, and that consideration should be given to devising terms which would equitably distribute such burden." The agreement or proposals therefor were to be submitted within 30 days, and consummation of the merger would constitute irrevocable assent to a lease prescribed by the Commission subject to judicial review of any decision as to the effect of operations thereunder on the inclusion terms. On September 1 the NH Trustees on the one hand and PRR-NYC on the other reported that it would be impossible to prepare a lease and have this made effective in time to meet NH's desperate needs; they submitted as an alternative proposal that immediately upon consummation Penn-Central would commit itself to purchase up to $25,000,000 of Trustees' Certificates over a period of three years. The proposal of PRR and NYC was that certificates

so purchased could be tendered as part of the purchase price of NH; the Trustees' proposal was that upon the closing of the purchase Penn-Central should pay an amount equal to NH's Adjusted Net Deficit for the period subsequent to consummation of the merger.[15] By order served September 12, 1967, the Commission took note of these submissions, directed a hearing on September 25, 1967, to enable it to determine "(1) whether a lease agreement, a loan arrangement, or other alternatives afford the most suitable means of assuring the continuation of the NH's operations until the NH assets can be transferred to the ownership of Penn-Central, and (2) equitable terms for the arrangement adopted," dispensed with an examiner's report, and broadened the condition clause of its August 3 order so that consummation of the merger would constitute an irrevocable assent of Penn-Central "to lease the NH or enter into a loan or other appropriate arrangement with the NH for continuation of the NH's operations under such just, reasonable and equitable terms as the Commission may require," subject again to judicial review.

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15 Adjusted Net Deficit is any red figure resulting from the following adjustment of NH's net railway operating income: Income would be increased by adding NH's income under the Grand Central Terminal Agreements to the extent recognized by NYC, and any deficiency in public assistance below current levels. Expenses would be decreased by deducting depreciation charged to railway operating income (other than depreciation which §9.14 of the Purchase Agreement requires to be deducted from the purchase price) but would be increased by adding fixed charges for rent for leased roads and funded and unfunded debt not in default. The submission of the NH Trustees reports that the deficit in net railway operating income does not take account of unpaid operating costs, aggregating some $5,000,000 in 1966, representing deferred real estate taxes, per diem in controversy, and unpaid tort claim obligations. Under its proposal these would be a charge against creditors. The Trustees' Certificates held by Penn-Central would be offset against the amount of Penn-Central bonds otherwise required to be issued on the closing.

The parties are in sharp disagreement whether the Supreme Court disapproved our holding on the plaintiffs' lack of standing. There is little profit in an extended attempt at exegesis; the extracts from the briefs before the Court which have been submitted to us add nothing to the words of the short opinion. Our inclination is to take the Court's statement, "it appears inappropriate to review the decision of the District Court at this time," as meaning what it says. The Court seems to us to have deferred decision on a difficult question of standing which it thought might become academic in view of the remand to the Commission directed in the *Baltimore & Ohio* suit or of the New Haven inclusion proceeding; if this proved not to be so, it wished us to reconsider the question in the light of subsequent developments. While we entertain no doubt as to the correctness of our decision of last fall as the case then stood, we recognized that matters would appear differently if the reorganization court found that the NH Trustees, even though acting in the best of faith, had disabled themselves from properly representing the estate on a certain issue, 261 F. Supp. at 394. Judge Anderson's order of July 11, 1967, did something along these lines; we think it plain that the Trustee under the First and Refunding Mortgage would have had standing if the Commission had taken no heed of its lease proposal. Although it can be argued that the court's order went no further than that, we take a broader view—particularly in view of the explanation by the Trustee under the First Mortgage Bonds at the argument before us that its failure to institute legal action was due to its belief that the plaintiffs were effectively representing the bondholders.[16] Similarly, what we

16 We find no force in the argument that the standard "no-action" clause in the First and Refunding Mortgage Indenture bars action by a bondholder or a bondholders' committee. The clause applies only to

previously said with respect to untimeliness, 261 F. Supp. at 394-95, is to some extent inapplicable in light of the changed economic position of the NH and the proceedings we have just recited.

Insofar as the complaints seek to enjoin consummation of the merger pending inclusion of the properties of NH by way of sale, they are sufficiently answered by Judge Anderson's order of July 11. In his view any substantial postponement of consummation means speedy death for the New Haven; hope lies rather in early consummation subject to a commitment that will fairly assure continued operation while the administrative and judicial mills continue their painfully slow grind. In its order of August 3, 1967, the Commission reiterated its conclusion that contentions "that there are possible solutions to the NH problem other than inclusion in Penn-Central are without merit," and at the argument before us Gruss' counsel conceded that the only alternative to inclusion in Penn-Central is liquidation. While the Committee holds out the possibility of condemnation by the four states served by NH, wishful thinking will not meet imminent payrolls.

Indeed, the plaintiffs now appear to recognize that injunction of consummation pending purchase would mean a cessation of operations by NH, and would be satisfied to have us permit consummation if this were conditioned on a lease wherein Penn-Central would shoulder all operating losses, whether or not caused by the merger, until NH either was included or ceased to run. Penn-Central is understandably unwilling voluntarily to go so far, although under the Commission's order of September 12 the com-

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suits "for the foreclosure of this Indenture, or for the execution of a receiver, or for any other remedy hereunder . . . ." Moreover, even if the clause were applicable, the Trustee appears to have waived it.

panies by consummating the merger take the risk, subject only to the safeguard of judicial review, that they may be compelled to do just that. *Per contra,* if the Commission's order should prove unsatisfactory to the plaintiffs, they too will be entitled to seek review. What is urgent to avoid cessation of NH's vital service are (1) early consummation of the Penn-Central merger and (2) a Commission order prescribing some form of financial aid that will permit the NH's operations to continue beyond December 31, 1967, when, as the NH Trustees now advise, their cash available for operations will be exhausted. The Commission has given every indication of its intention to do precisely that. To be sure we are confronted, as we were a year ago, with a condition that is not in all respects complete, although far more nearly so than the Appendix G conditions as they then stood. But with the situation now so serious, there can hardly be doubt that it is better to accept what is good for the New Haven than permit the patient to die while in quest of the best.

The remaining point is the Committee's contention that at the very least NH should have the benefit of Appendix G conditions. In our previous opinion we outlined why the Commission could well have considered these to be unnecessary or inappropriate, 261 F. Supp. at 389-91. The unlikelihood that Penn-Central would avail itself of its opportunities for diversion from NH in the interval prior to inclusion would be heightened if it is now required to bear or share in operating losses. Moreover, we are told that the issue of financial indemnity conditions is under advisement by the Commission in the NH Inclusion case; the Commission thus has power to include such conditions and plaintiffs can seek review if it does not. While such conditions would become effective only in the event of NH's

ultimate inclusion and in practical terms would thus simply produce an addition to the purchase price, it is likely, if not indeed certain, that only in the event of inclusion will there be a New Haven operation; we find nothing in the Interstate Commerce Act that would compel the Commission to require an operating railroad such as Penn-Central to reimburse creditors of a defunct one for losses due to merger diversion. Particularly in view of the failure to raise the issue of protective conditions at an earlier date, see 261 F. Supp. at 391 n. 3 and 394-95, we decline to direct the Commission to modify the order authorizing the merger so as to include them.

We therefore dismiss the complaint without prejudice to any relief plaintiffs may be advised to seek as a result of the Commission's decision in the proceeding initiated by its orders of August 3 and September 12, 1967, or of its order in the NH Inclusion case.

III. The N & W Inclusion Action

No substantial attack is made on the Commission's basic finding, as set forth under the headings "Public Interest," 330 I. C. C. at 784-89, "Advantages to N & W," 330 I. C. C. at 792-93, "Advantages to petitioners and to the public," 330 I. C. C. at 794-95, and "Competitive effects," 330 I. C. C. at 795-96, that inclusion of E-L, D & H and B & M in the N & W system on proper terms is in the public interest. No carrier not a party to the inclusion contends in this court that it will be adversely affected or requires additional conditions for its protection. Only two points come even close to the larger public interest in the transaction, and little discussion is needed to show their lack of merit. *First*, N & W complains that the Commission should have considered the desirability of including the three roads

along with Reading and CNJ as wholly owned subsidiaries in a larger N & W-B & O-C & O System (the so-called DERECO plan). The Commission was justified in refusing to do this. Such a course would have frustrated the expeditious decision in the instant case envisioned by the Supreme Court, 386 U. S. at 392, since hearings on the N & W-B & O-C & O proposal were still in progress. On the other hand, nothing here decided by the Commission would block subsequent consideration of the larger proposal. *Second,* N & W would have us fault the Commission for failing to find that inclusion of any of the three roads in Penn-Central would not be in the public interest. The Commission did find "that inclusion of the petitioners in the N & W system is preferable to their inclusion in the Penn-Central." 330 I. C. C. at 796. That was the most that was required; apart from what we have said concerning a similar contention in the merger actions, the negative determination sought by N & W was not within the issues of the *Inclusion* case.

With respect to the terms N & W alleges numerous errors in favor of the included lines, while B & M claims the price fixed for it is too low. Insurance companies holding some $30 million of E-L bonds contend that the order will permit dilution of the security for their mortgages and impair or prevent the payment of interest particularly on income bonds. On the other hand, E-L and D & H are now satisfied with the terms, which E-L's stockholders have already accepted and D & H's board of directors has unanimously voted to recommend.

We note at the outset that the scope of our review of an order prescribing such terms is limited. This court has said that "Because of the broad authority conferred upon the Commission by §5 of the Interstate Commerce Act and the technical complexities of a merger case, the doctrine of

administrative finality is particularly applicable." *Friedman* v. *United States,* 168 F. Supp. 815, 818 (1958). Relevant also is this court's statement in *Stott* v. *United States,* 166 F. Supp. 851, 857 (1958), that on such matters we are not permitted to substitute our own judgment for that of the agency, or consider the expediency or wisdom of its decision, or whether on like testimony we would have made a similar ruling.

Employee Protective Conditions.

N & W's objections to the employee protective conditions, 330 I. C. C. at 822-26, fall as soon as this limitation on our power is recognized. The Commission noted that in the earlier phase of this proceeding N & W had entered into agreements with many labor unions providing that job elimination resulting from absorption of the Nickel Plate, the Wabash and other carriers would be accomplished only through normal attrition; these agreements were later modified to prohibit the transfer of employees beyond their general locality. For other employees the Commission had then prescribed conditions in line with its general practice, 324 I. C. C. at 50. Here the Commission prescribed the same conditions—either N & W's existing contracts were to be modified to take in employees of the included roads or similar new agreements were to be written; if no agreement was concluded within 60 days, the Commission would prescribe appropriate conditions.

The Commission acted within its powers in requiring N & W to protect employees of the three roads as thoroughly as those of the roads it was permitted to absorb only on the condition that it would accept these lines if the Commission so directed. It is no matter that as late as *Erie R. Co. Merger,* 312 I. C. C. 185, 196 (1960), sustained in *Bhd of Maintenance of Way Employees* v. *United States,*

366 U. S. 169 (1961), and *Atchison, T. & S. F. Ry. Co. Merger*, 324 I. C. C. 254, 261 (1965), the Commission had rejected attrition conditions upon finding they would merely "preserve unneeded jobs." If the Commission believes more liberal protection against the effects of inclusion is appropriate either in general or, as here, on the facts of a particular case, that is a policy matter which Congress left for it to decide. Moreover the record strongly indicates that the attrition condition will not significantly affect the savings contemplated from the inclusion of the three roads simply as wholly owned subsidiaries, 333 I. C. C. at 823-24. While there is more merit to N & W's contention that the protection should not extend to job reductions from causes other than inclusion, the Commission's decision that employees of the three roads should be treated in the same way N & W had agreed to treat its present employees has a sufficient basis in reason that we cannot properly upset it; and although N & W is correct that the figures at 330 I. C. C. 824 do not include job eliminations from other causes, it presented no evidence as to what these would be or that they would constitute a serious burden. Finally we reject N & W's objection to the imposition of a "job freeze" during the 60-day period allowed for working out an agreement or, failing that, a Commission decision, which should be speedily forthcoming. N & W would scarcely be making extensive work reassignments in this brief interval, and we see no basis for its fears that the freeze would continue during possible litigation over a Commission decision allowing work reassignments.

The Commission's General Standard and Method of Valuation and N & W's Criticisms.

As this is the first case in which the Commission has fixed an equitable purchase price under §5(2)(d), it prop-

erly sought to elucidate the standard that should govern its action. It held it was "not required to find that N & W benefits affirmatively and financially under the terms of inclusion," that N & W would have no legitimate complaint if the terms "will have a neutral effect on the N & W stockholders, neither diverting any funds from such stockholders to petitioners' stockholders nor in any other way diluting the present holdings of the N & W stockholders," and that "the inclusion of petitioners on terms fully recognizing their benefit to the N & W system is also equitable to petitioners since it attributes to them earnings not obtainable by them as independents." 330 I. C. C. at 801-02.

N & W's claim that benefits of the inclusion must be equally divided between each included road and itself forgets the purpose of §5(2)(d) and the wide latitude accorded the Commission in carrying it out. This section, enacted as part of the Transportation Act of 1940, 54 Stat. 906, is but the latest in a series of enactments going back to the "recapture" clause of Transportation Act, 1920, 41 Stat. 489-91, whereby Congress has attempted in one way or another to require stronger railroads to help carry some weaker ones. Recognizing that voluntary consolidation would include only the more desirable candidates and would leave the weaker brethren to languish, Congress authorized the Commission to condition permission to consolidate on the inclusion of undesired lines. This authority was not limited to railroads that were harmed by the merger; Congress gave the Commission a power it could utilize to establish a sound railroad structure. The Commission was thus entirely justified in holding there was no basis for complaint by the acquiring road so long as the forced inclusion did not diminish the benefits of the consolidation to which it was attached as a condition. Indeed, although we find it unnecessary so to decide,

it may well be that, as the Commission intimated, 330 I. C. C. at 802, it could lawfully invade the benefits of the prior consolidation on a showing that inclusion was required by the public interest and that allocating some of such benefits to the owners of the additional roads was the only way of meeting their reasonable expectations, perhaps based on possible inclusion in another system that would be less in the public interest.[17] While N & W cites decisions where the Commission has divided benefits in approving the fairness of consensual arrangements,[18] the Commission did not say in these cases that a basis more favorable to the weaker road would be inequitable. Apart from the limited scope of *stare decisis* to administrative determination of policy issues, see *Pinellas Broadcasting Co.* v. *FCC,* 230 F. 2d 204, 206 (D. C. Cir.), cert. denied, 350 U. S. 1007 (1956), these decisions did not bind the Commission to follow a similar practice when fixing equitable terms for involuntary acquisitions under §5(2)(d) and, in accepting the "Appendix O" conditions to its merger, 324 I. C. C. at 148, N & W had no sufficient basis for assuming that they did.

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17 If the line promoting the consolidation did not wish to go through with it under such a condition, it could of course refuse. Compare *Atlantic Coast Line R.R.* v. *United States,* 284 U. S. 288 (1932). No different result would be demanded because, as here, a carrier had elected to consummate an acquisition and begun to enjoy its benefits subject to the Commission later fixing equitable terms for the inclusion of other carriers.

18 This was the situation in *Louisville & N. R. Co. Merger,* 295 I. C. C. 457, 497 (1957); *Norfolk & Western-Merger-Virginian,* 307 I. C. C. 401, 430 (1959); and *Seaboard Air Line R. Co.-Merger-Atlantic Coast Line,* 320 I. C. C. 122, 157, 192 (1963). In *Florida East Coast R. Co. Reorganization,* 282 I. C. C. 81 (1951), also cited in N & W's brief, the Commission, before approving a reorganization plan submitted by the Atlantic Coast Line for a merger with the debtor, insisted that the debtor be credited with half the prospective merger savings, 282 I. C. C. at 159-60.

Having thus established the ground rules, the Commission next had to determine the corporate method by which inclusion of the three roads should be effected. Although merger would maximize both economies and traffic gains, the Commission found merger would be unfair to N & W in the cases of E-L and B & M because of their heavy debt and, in the latter instance, large early maturities. While there were no similar obstacles to a merger of D & H, N & W objected to acquiring that company's excess working capital and D & H took the position, which the Commission accepted, that if it had to retain this, it was entitled to sell its operating assets on a taxable basis that would produce an immediate refund of some $4,500,000 and large credits against the income D & H expects to realize from retention of the excess working capital.

Under the plan prescribed by the Commission E-L and B & M are to convey their assets, subject to existing indebtedness, to new subsidiaries all of whose common shares will be owned by another subsidiary, NC, whose common stock will be owned by N & W; the shareholders of the two companies would then receive preferred stock of NC convertible into N & W common on a share for share basis at the end of five years or sooner if Congress should enact legislation (the Keogh bill) which would give N & W the benefit of these carriers' loss carry-forwards. D & H is also to sell its assets other than excess working capital, subject to existing indebtedness, to a N & W subsidiary which is to pay in cash[19] or, at its option, in a note and N & W stock as

19 N & W objects that the Commission did not also fix cash prices for E-L and B & M. N & W did not raise the issue until its exceptions to the report of Commissioner Webb as hearing examiner. The Commission was not bound to fix such a price, especially if, as it thought, 330 I. C. C. at 818, 331 I. C. C. at 29, 30, savings and traffic gains resulting from inclusion should not be considered on that alternative, see fn. 22.

explained below. This plan of incorporating the three companies as subsidiaries necessarily results in underestimating the benefits of inclusion if N & W's resourceful management should ultimately find it possible to work out arrangements with bondholders that would permit merger and thereby obtain freedom to deal with the personnel and properties of N & W and the included roads as a single entity.

The process followed by the Commission in setting the price was broadly this: It first established for each of the three roads a normalized year's income unaffected either by inclusion in N & W or by the Penn-Central merger. It then added the benefits the road would obtain from inclusion in N & W both by saving expenses and by gains from existing traffic rerouted by some element of the future N & W-E-L-D & H-B & M system so as to produce the longest system haul.[20] Next the Commission sought to satisfy itself that any traffic losses the three roads would suffer to Penn-Central would be offset by other benefits to N & W not already taken into account. It then established for E-L and

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20 These gains were estimated as follows, 330 I. C. C. at 804, 834:

Line		Gain in gross revenues through N & W's efforts (1)	Gain in gross revenues through all carriers' efforts (2)
1	N & W	——	$ 4.62
2	E-L	$ 2.8	4.33
3	D & H	1.4	2.13
4	B & M	1.6	1.72
		$ 5.8	$12.80

The figure in Line 1, column (2), was not utilized in adjusting the income of the three roads. N & W contends that the figures in column (1) are excessive by $1.16 million. The argument concerns the extent to which the results of N & W's rerouting efforts would approach petitioners'. Commissioner Webb gave N & W's contention sufficient weight when he credited it with only $5.8 million gain, derived from witness Wyer's survey (E-L Exhibit 99), rather than the full $7.0 million which was the sum of line 7, columns 1-3, 330 I. C. C. at 834, as had been claimed.

B & M a ratio between the adjusted net income per share of the included road for the period utilized and that of N & W for the year ending June 30, 1966, the latter being adjusted upward for yet unrealized net savings from N & W's previous merger. Finally it established exchange ratios for these roads which took account not only of these earnings ratios but of all other relevant factors. Thus, while the earnings ratio for E-L was .172 to 1, the Commission set a lower exchange ratio of .128 to 1 which E-L's financial consultant had regarded as fair and equitable.[21] For B & M the earnings ratios were .126 per common share and .220 per preferred share; the Commission reduced these to exchange ratios of .10 and .175. In fixing a cash price for the sale of all assets of D & H except excess working capital, the Commission capitalized at 8.3% the adjusted income available for fixed charges other than income on the excess working capital, inclusion savings and traffic gains; from this it deducted the long term debt and a $4,500,000 tax refund expected to be immediately received by D & H and arrived at a cash price of $41,211,000.[22]

N & W attacks almost every step in this process. To begin with, it objects to the Commission's using as a base for computation the D & H and B & M earnings for 1965

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21 The downward adjustment takes account of the lower "quality" of E-L's earnings, where, on 1965 figures, only 6¢ per dollar of railway operating revenues were available for fixed charges as against 26¢ for N & W, 330 I. C. C. at 808, making E-L more vulnerable to decreased revenues or increased expenses.

22 N & W was given an option to make the purchase with a $1,000,000 five year 6% note plus 412,627 shares of N & W stock valued at the current market value of $105 per share, or a total of $44,325,855. The cash price for D & H is $3 million lower than the stock price, because, in reaching the cash price, D & H's earnings were adjusted to eliminate control savings and traffic gains, to which the Commission felt the D & H stockholders would not be entitled in a cash transaction since they would not bear the risks of the new enterprise.

adjusted, in a manner proposed by petitioners' witness Wyer and revised by N & W's witness Brinner, to eliminate nonrecurring items and reflect on a full year basis operational changes effective for only part of 1965 (the so-called "Wyer-Brinner adjustments"). N & W says that since 1966 results are now available—and are lower than the adjusted figures—the Commission was bound to use them, especially since it used an average of 1965-66 earnings as a base for E-L and earnings for the year ended June 30, 1966 as a base for N & W. It also calls attention to the decline in E-L earnings during 1967.

As the hearing before Commissioner Webb began on April 20 and ended on August 10, 1966, results for 1966 were not available; indeed when the hearing began, the latest figures that had been available to Wyer were for the 12 months ended October 31, 1965, and Brinner's revisions were designed to take account of the full year 1965 rather than the earlier 12 months Wyer had used. The hearing examiner and the Commission having properly used 1965 figures, they were not required to start anew when the 1966 figures for D & H and B & M became a part of the record as a result of stipulation of the carriers' Form A reports. These are simply raw figures which have not been analyzed to remove extraordinary items or to place others on a full year basis; by the time the experts could do that and the Commission could render a new report, 1967 figures would be available and, on N & W's argument, the process must start again. The law does not compel an infinite regress. Indeed, N & W's present insistence on the importance of the newest data contrasts sharply with the position it took before the Commission as to the appropriate base period for valuing E-L. When Commissioner Webb used the most recent data then available—the reported income available for fixed charges for the year end-

ing June 30, 1966—to reflect E-L's continuing efficiency program, N & W objected and, on its exception, the Commission used a lower figure representing the adjusted average for 1965 and 1966. And the Commission's use of N & W's adjusted income for the year ended June 30, 1966 rather than the lower figure for 1965, compare 330 I. C. C. 816 and 881, is surely not something of which N & W can fairly complain. While the Commission was at liberty to consider the more recent figures, it was not bound to do so.

N & W argues further that if 1965 figures were to be used, they should not have been adjusted as Wyer proposed since his adjustments "reflect only the ordinary operational changes which are constantly occurring on any railroad and as to which *no* adjustment need be made." This same argument was made before the Commission, and the agency, in the exercise of its expert judgment, rejected it. N & W has not analyzed Wyer's calculations in detail to show that the Commission's decision was arbitrary. Its only specific grievance goes to the Commission's failure to consider the significance of the substantial wage increase granted to B & M employees one day after the base period's end. It argues that many of the efficiencies B & M had introduced in 1965 were offset by this increase. But the Commission found that the wage increase did not undermine its conclusions based on the year ending December 31, 1965. It noted "that in the past B & M has demonstrated an ability to offset wage increases by improved efficiency, and conclude[d] that this ability should only be heightened after inclusion in the N & W system." 330 I. C. C. at 820. This seems an adequate answer. Of course, to determine accurately whether the wage increase was offset, one would have to study the further efficiencies

B & M instituted during 1966. But this detailed study, as we have just explained, was not required.

N & W next contends that the adjusted income of E-L and B & M should be adjusted downward for undermaintenance. The subject also is one where deference is owed to the Commission's expertise, and we are content to rest on its discussion, 330 I. C. C. at 809-11 and 858-65, and the related portions of Commissioner Webb's report, which demonstrate substantial evidence to support the Commission's refusal to make the requested adjustment.

In a third argument directed at the pre-inclusion earnings N & W asserts "there is no evidence to support the Commission's finding that E-L will have $7.5 millions of earnings attributable to relief from the commuter burden."[23] The $7.5 million figure is made up of the following items:

	In Millions
1. Exemption of passenger service facilities from property taxation	$0.7
2. Discontinuances already authorized by N. J. Board of Public Utility Commissioners	2.0
3. N. J. property tax reduction	1.3
4. Assistance payments	3.5
	$7.5

Since the first three are already in hand,[24] the argument boils down to the point that when the record closed, no

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23 The adjustment appearing in the report is $6.8 million, 330 I. C. C. at 813, which, however, reflects the receipt during the test period of part of the estimated $1.3 million reduction in New Jersey property taxes.

24 N & W argues that there was no substantial evidence supporting the amount of the second item. The savings estimate was made by the

contract for future assistance payments had been signed and that in any event these cannot be counted on since they depend on annual appropriations by the legislature.

Here again N & W is insisting on a degree of certainty beyond the capacity of an expert agency forecasting earnings; the Commission had to make the best estimate of future New Jersey assistance payments that available material permitted. In 1965 E-L received $3.4 million and a witness for the State of New Jersey testified that the new contract then being negotiated would pay about $3.5. N & W does not contend that post-hearing events have belied this estimate. To be sure payments under the new contract are contingent upon annual appropriations by the legislature, but if that kind of uncertainty prevented reasonable prediction, the conduct of business would be impossible. The Commission's estimate was surely more accurate than one that ignored the assistance payments altogether.

Effect of the Penn-Central Merger.

N & W mounts a heavy attack on the Commission's conclusion that "since the petitioners' traffic losses to Penn-Central are fully offset by traffic savings and additions to N & W resulting from inclusion, those traffic losses do not adversely and materially affect petitioners' value and should be disregarded in the computation of exchange prices." 330 I. C. C. at 809.

We begin with some general observations. Commissioner Webb, who had presided at the hearing, refused to reduce petitioners' net income on account of anticipated losses to Penn-Central, in part on what seems to us the wholly reasonable ground of N & W's failure to introduce detailed

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New Jersey Board of Public Utility Commissioners, and the Commission was justified in relying on it.

evidence as to the losses it would suffer, 330 I. C. C. at 802. However, he also declined to credit the three roads with any of the anticipated gains from rerouting of traffic to provide the longest system haul. Rightly believing that the second of the two rulings prejudiced petitioners, the Commission upset both. We fail to understand why the two issues had to stand or fall together. N & W manifestly was not entitled to compare its own earnings unreduced by Penn-Central losses to petitioners' earnings so reduced.

We also do not accept N & W's premise that the Commission was bound to discount petitioners' earnings for traffic losses to Penn-Central. Our position rests not on the broad view sketched above, see text accompanying fn. 17, but on considerations relating to this particular case. If N & W had been required to include petitioners before completing its merger with the Nickel Plate and the Wabash in 1964, the three lines would have been entitled to credit for the traffic gains through rerouting but would hardly have been subjected to a penalty for losses arising from the contingency of a future Penn-Central merger. The Commission permitted consummation of the earlier consolidation without inclusion of E-L partly because the parties asked to be permitted "to resolve the problems between them in due course of time", 324 I. C. C. at 22, in voluntary negotiations. These having failed, N & W should stand no better because it chose to complete its merger, which promised annual savings of $29,000,000, on condition that it would include the lines later if the Commission directed. Moreover, as Commissioner (now Chairman) Tucker pointed out in his dissenting expression in the N & W merger case, 324 I. C. C. at 57-60, and his concurrence in the Penn-Central merger case, 327 I. C. C. at 549, the N & W merger, along with the previous C & O-

B & O unification, 317 I. C. C. 261 (1962), gave strong impetus to a Penn-Central merger. In approving the latter the Commission stressed "that applicants will face increasing competition from those two greatly strengthened rail systems." 327 I. C. C. at 519. We see scant equity in allowing N & W to discount petitioners' earnings for all losses due to an event which it must have recognized as highly likely when it accepted the "Appendix O" conditions and to which its own merger had led in considerable measure.[25] It is no matter that, as N & W urges, its merger did not itself damage petitioners. Neither is it decisive that N & W was controlled by PRR at the time; it sought the merger as a corporation and has derived large benefits from it. If petitioners' losses to Penn-Central are to be taken into account at all, N & W could fairly be asked to bear at least some share—at minimum, for example, the amount of traffic it has already gained by diversion from petitioners or Penn-Central as a result of its merger. We stress this both to avoid future misunderstanding and to indicate that the Commission approached the problem of losses to Penn-Central on a basis considerably more favorable to N & W than we believe was required; we do not, however, rely on it as a ground for our decision.

Finally we emphasize that the figures detailing the estimated losses to Penn-Central which have been so heatedly debated are infected with the "delusive exactness" that Mr.

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25 Evidently Commissioner Webb had something of this sort in mind when he said: "If the inclusion of EL, D & H, and B & M in either the N & W system or the Penn-Central system is practically assured, their inclusion in the system chosen by the Commission in the furtherance of national transportation objectives should not be on terms which reflect any diminution of capital value attributable to the traffic diversion impact of the other system. In other words, the petitioners should not be penalized for anticipating the Commission's desire to preserve rail competition in the territory they serve." Report, p. 28.

Justice Holmes, speaking in a different context, characterized as "a source of fallacy throughout the law." *Truax v. Corrigan,* 257 U. S. 312, 342 (1921). The estimate that petitioners, after inclusion in N & W, would lose $16.34 million of freight revenues to Penn-Central[26] rested primarily on an N & W study of their traffic for the twelve months ended July 1965. Thousands of samples were subjected to examination and a judgment made as to the percentage of each that would be diverted. While Commissioner Webb reduced certain items, he accepted the bulk of the study although noting its infirmities, since he had given petitioners the benefit of the doubt on their rerouting studies. It is not apparent to us that the two matters were *in pari materia.* Petitioners' studies, supervised by an independent expert, involved a judgment of how they could reroute traffic they were already handling; N & W did not make a separate study but rather restructured the petitioners' data—which originally was designed to show traffic gains—and made conclusions as to how much petitioners would lose to a different railroad. Yet no matter how often the Commission repeated that such figures were "approximations" or "rough estimates," see 330 I. C. C. at 806, the craving of the human mind for a certainty that is unattainable tends to crystallize them into a sharpness that is not there. As Mr. Justice Cardozo pertinently observed, "An intelligent estimate of probable future values, and even indeed of present ones, is at best an

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26 The figures as adjusted by Commissioner Webb broke down as follows:

	Millions
E-L	$11.37
D & H	3.08
B & M	1.89
	$16.34

330 I. C. C. at 806.

approximation. The like is true of a forecast of future revenues. There is left in every case a reasonable margin of fluctuation and uncertainty." *Dayton Power & Light Co. v. Public Utility Comm'n*, 292 U. S. 290, 310 (1934).

N & W conceded that the Penn-Central merger would adversely affect its own traffic and that petitioners' inclusion would have "some effect" in protecting it. However, while it made the detailed study of petitioners' losses we have just described, it made no similar study of its own losses to Penn-Central or of the extent to which petitioners' inclusion would assist it in reducing them. No one else was in a position to do this, especially in view of N & W's failure to furnish even the detailed break-down of its interline revenues for which Commissioner Webb had called at the prehearing conference. Faced with this impasse, the Commission attempted to assess the assistance the three roads would render as best it could.

N & W had estimated that if the three roads were included in Penn-Central, its maximum loss would be $22 million.[27] Since the Commission found that inclusion of the petitioners would strengthen N & W, it concluded that, without petitioners, N & W would have a greater loss to Penn-Central and undertook to "determine how much greater and whether the further loss would be as great as" the $16.3 million which N & W estimated the three roads would lose to Penn-Central, 330 I. C. C. at 807. Simply for purposes of illustration it added the $16.3 million to the $22 million, yielding a total of $38.3 million. It then considered whether, without the three roads, N & W "could lose (or fail to gain) up to a total of $38.3 million of its revenues in competition with Penn-Central

27 This figure was obtained by applying the percentage of N & W's interline revenues with petitioners which N & W had estimated would be diverted, to wit, 5.3%, to N & W's total interline traffic of $413 million.

or 6 percent of N & W's annual gross revenues of $600 million," 330 I. C. C. at 807. The Commission found it reasonable to believe that N & W's losses without petitioners could reach such an amount and that their addition would thus save it as much traffic as they would lose. N & W protests that no evidence in the record supports the conclusion that without petitioners' help it would lose 6% of its revenues. We would agree that, taking account of the location of the two systems and the nature of N & W's historic traffic, the figure seems high, at least in relation to the 5.6% estimated diversion from the petitioners who are more exposed to Penn-Central competition and the 5.3% estimated diversion of N & W's revenues from interline traffic with them, although, as the Commission indicated, N & W's traffic witness declined to testify that the adverse impact of the Penn-Central merger on it would be less than on petitioners, saying rather "I can't state a relative opinion on that question. The three petitioners would be hurt and so would the N & W system." 330 I. C. C. at 805.[28] But if the Commission's minuend of $38.3 million may well be too high, so is the subtrahend since, as the Commission noted, 330 I. C. C. at 807 fn. 15 and 808, the $22 million was a maximum estimate and a high one for the very reason just indicated. The Commission was not compelled to accept N & W's response that petitioners can assist only as to traffic on which they "have a handle," namely, the $36.6 million of N & W traffic in which they participate. Petitioners can help N & W not only with respect to interline traffic they now carry with it but when-

28 The witness first testified that inclusion of petitioners would not protect any N & W freight revenues that would otherwise be lost to Penn-Central. However, he conceded in response to Commissioner Webb's questions that he had not made a detailed estimate of the extent of N & W's losses to Penn-Central and admitted on cross-examination that his discussion had been very incomplete and that petitioners' inclusion would yield "some" service benefits.

ever their inclusion will enable N & W to compete with Penn-Central more effectively. In view of N & W's failure to submit the detailed breakdown of its traffic necessary for a more nearly accurate judgment of the help petitioners could render, the Commission was warranted in proceeding as it did. Similarly, while the methodology of a second and lower estimate of a $9.5 million saving, 330 I. C. C. 805 & fn. 12, was faulty as the Commission recognized, the end result, that inclusion of petitioners might save N & W against Penn-Central diversion some 1.6% of its total freight revenues or 2.3% of its interline freight revenues, is not so clearly unreasonable as to invite judicial condemnation, at least when no better figures were available.

Furthermore the Commission properly did not consider itself obliged to find that the entire $16.34 million of petitioners' estimated losses to Penn-Central would be offset by N & W savings of this one type. It credited the three roads with the $4.62 million in added N & W revenue resulting from petitioners' rerouting traffic to provide the longest system haul, line 1, column (2), in the table reproduced in fn. 20, which had not been allocated to any of the three lines. It also took account of what it thought would be "the greatest single gain for N & W," namely, "its enhanced ability to obtain *new traffic* over and above the rerouting traffic in competition with Penn-Central and other modes of transportation," 330 I. C. C. at 805;[29] E-L's inclusion, for example, would permit N & W to gain "several million" dollars in new revenue by providing single line service to New York City. 330 I. C. C. at 806. N & W is mistaken in asserting that this double-counts the traffic already used to increase petitioners' revenues; the Commission's report is clear that those figures included only traffic N & W or the petitioners "now handle at least in part," 330 I. C. C.

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29 This was not limited to $2.2 million as N & W claims.

at 803.[30] Moreover, a buyer in N & W's position would consider not only the extent to which the petitioners could strengthen its competitive position upon inclusion, but also the damage they could do if negotiations were to fail and they were to remain independent or ultimately be allowed to join the Penn-Central system. While the Commission found that the three roads would have no incentive to divert N & W traffic during the protected period because, among other reasons, "they expect to become affiliates of N & W, and could not afford to take traffic from that system" 330 I. C. C. at 355, the situation would be quite different if petitioners were to believe they might become or in fact did become permanent parts of Penn-Central.[31] When all these elements are considered, the Commission's conclusion, 330 I. C. C. at 809, quoted at the outset of this discussion, is plainly rational. What is demanded is substantial evidence to support the agency's ultimate finding, not logical perfection in every step.[32]

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30 The passages from Commissioner Webb's report cited by N & W to support its contention of double-counting did refer to new traffic as one of the several reasons for giving the petitioners' rerouting studies the benefit of the doubt. But he more than offset any advantage that decision afforded the three roads by giving N & W the benefit of the doubt when calculating their losses to Penn-Central. 330 I. C. C. at 836-38.

31 E-L's brief cites in this connection that N & W's study showed N & W revenues of $10.46 million from traffic originated or terminated by petitioners and handled by N & W as an intermediate carrier; in a comparable situation where N & W was an intermediate carrier on traffic originated or terminated by NH, it estimated 48.1% diversion from NH's inclusion in Penn-Central. An additional $13.19 million of the $36.6 million N & W revenues from traffic interchanged with petitioners represent other traffic originated or terminated by petitioners and susceptible to diversion by them.

32 We therefore find it unnecessary to pass upon the validity of another theory developed by the Commission, 330 I. C. C. at 808-09, based on the higher value of traffic gained (or not lost) by N & W than of traffic lost by petitioners. Apart from other criticisms, this theory does appear to

Considerations Relating to Individual Roads, and B & M's Complaint That the Price for It Is Inadequate.

Even if we had reached a different result on the traffic issue just discussed, we would sustain the prices fixed by the Commission on the basis of other factors relating to individual roads.

(1) *Erie-Lackawanna.*

E-L cites many elements of conservatism in the valuation of its property which N & W has not successfully challenged. The Commission's figure of adjusted earnings took account of a potential $2.2 million increase in E-L's New York property taxes that cannot occur before 1971, allowed for $3.3 million in additional contingent interest charges that will not be incurred before 1972, and ignored a $1 million saving in income taxes that E-L will contribute to N & W forthwith. While the earnings comparisons would have supported a ratio of 0.172 shares of N & W for each share of E-L, the Commission first marked this down by some 25% to 0.128. Furthermore, the stock in the new N & W subsidiary that would be issued to E-L shareholders is not convertible into N & W stock for five years, unless the Keogh bill is enacted at an earlier date. In the interim E-L stockholders would almost certainly receive no dividends. N & W's financial expert testified that similiar shares would sell for 15-20% less than the N & W common into which they were ultimately to be convertible. Discounts of this magnitude demonstrate the fallacy of an attack directed at any single item of earnings; we cannot

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be inconsistent with the treatment of petitioners' gains effected through rerouting which were estimated to produce net income of about 41 or 42 cents per dollar of gross, 330 I. C. C. at 815, 817, 821.

emphasize too strongly that the Commission's exchange ratios represented an informed judgment on all elements of value rather than a mere mathematical calculation from some of them. The Commission also correctly noted that "even if EL earnings are not sufficient to support the proposed stock exchange ratios, N & W's investment is protected since E-L's income would be earned subject to five substantial tax benefits," including several not heretofore mentioned. 330 I. C. C. 816 and 846-47. E-L's brief contains computations not challenged by N & W showing that tax savings will insure N & W's recovery of its $55 million investment in E-L within 10 years even if E-L earned nothing.[33] In the light of all this, the Commission was justified in concluding that any overestimate of E-L's earning power was fully compensated, 330 I. C. C. at 816.

(2) *Delaware & Hudson.*

D & H brings forward equally persuasive examples of the Commission's conservatism. On the cash alternative, which is what N & W sought and will almost surely exercise, see fn. 22, D & H receives no credit for the $2.13 million gross revenues it will gain through rerouting. Hence the $3.08 million gross revenues estimated by N & W to be lost to Penn-Central are fully offset by these gains and the $852,000 of N & W revenues on interline traffic with D & H which the Commission found its inclusion would save.[34]

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33 We fail to appreciate the force of N & W's answer, namely, that E-L's financial expert testified his recommended exchange ratio was justified only if E-L had earnings at the level estimated by him. The Commission was not bound to adopt this testimony.

34 N & W's contention that this finding is inconsistent with the Commission's "adoption" of N & W's Penn-Central loss study is unconvincing. The Commission accepted this only as a "rough estimate" which gave N & W the benefit of the doubt.

Furthermore the cash alternative gives D & H no credit for $565,000 a year in control savings. Beyond all this is the indeterminate gain to N & W in obtaining new traffic as a result of D & H's inclusion.

N & W argues against this that the purchase of D & H's assets in a transaction wherein D & H's loss is recognized for tax purposes will result in larger income taxes for New D & H since it will not retain Old D & H's high basis for depreciation and will be unable to continue certain methods of accelerated depreciation. Having rejected a D & H merger proposal that would have preserved these tax benefits and produced substantial added control savings, N & W has no legitimate complaint when in deference to its objection the Commission sanctioned a different form of inclusion giving D & H substantial tax benefits but allocating to N & W $4,500,000 of them—nearly half of what it asserts the capitalized cost of the increased annual income taxes of $768,000 to be. Such action was well within the latitude accorded the Commission.

(3) *Boston & Maine.*

N & W's complaint as to the valuation of B & M stresses that company's long record of net income deficits, the lowest of which was $578,000 in 1965 followed by $1,540,000 in 1966. In light of this it attacks the Commission's black figure of $1,486,000 as irrational. However, this figure reflects the addition of $717,000 to net income as a result of $1,720,000 of traffic gains through rerouting and the deduction from expenses of $328,000 of control savings. The issue thus turns on the propriety of an estimated $441,000 of pre-inclusion income,[35] and this depends in large part

35 Commissioner Webb's estimate of B & M's prospective earnings, which the Commission accepted as a starting point, was $605,000. Since this figure includes $164,000 (50% of the $328,000) in traffic gains, it is only the remaining $441,000 that does not come from either control savings or traffic gains from rerouting.

on the savings anticipated from passenger train discontinuances, a subject within the Commission's expertise. Moreover there is some cushion in its scale-down of the exchange ratio for B & M common stock from .126 to .110 and preferred stock from .220 to .175. There remains only the issue of traffic losses to Penn-Central. As the initiating carrier has the greatest influence on shipper routing decisions, and B & M initiates a considerable portion of its traffic, its estimated loss—$1.89 million—is the lowest of any of the three carriers, not only in absolute but in percentage terms. Its position as an originating carrier should also enhance its ability to protect N & W traffic.

In sharp contrast to N & W's argument, B & M claims it has been undervalued. Although it alleges an underestimate of traffic gains, its more persuasive point concerns control savings. B & M sought inclusion through merger, and submitted studies as to the consequent savings on both a two-way and a four-way basis. However, when it became apparent that merger was not in the cards for any of the three carriers, petitioners' witness Wyer presented testimony on the savings (and traffic gains) resulting from inclusion as controlled subsidiaries. Wyer concluded that the only savings under control would be those resulting from consolidation of the traffic solicitation forces; he thought that savings from the consolidation of administrative forces available under merger would not accrue under control because of difficulties in working out agreements with labor organizations that would permit the transfer of work from one company to another. The Commission adopted his figures. By petition for reconsideration B & M sought an increased valuation relying primarily on testimony by a witness proffered by N & W and C & O-B & O in their merger proceeding, F. D. 23832, that demonstrated an intention to operate E-L, D & H, B & M, CNJ and Reading,

if included as controlled subsidiaries under the DERECO plan, in a manner that would effect economies (and traffic gains) considerably exceeding those estimated by Mr. Wyer. B & M then combined this testimony with Commissioner Webb's view, "There is no reason to believe that EL, D & H, and B & M as wholly owned carrier subsidiaries of a little Dereco would enjoy a greater measure of independence than they would as subsidiaries of a larger Dereco, or that N & W could coordinate the operations of five such subsidiaries but not of three," p. 58. The Commission was unpersuaded, 331 I. C. C. at 38-41.

We cannot fault the Commission for refusing to fix a higher value for B & M stock or for rejecting its request to deny its petition for inclusion if a higher value could not be set and thereby safeguard its right to seek compulsory inclusion in Penn-Central. We must indeed confess surprise that control savings would be as limited as Mr. Wyer estimated; we should have supposed that, notwithstanding the problems arising from labor agreements, it would be possible over the years to effectuate many savings in such categories as top management, purchasing, planning, engineering and accounting. B & M concedes, as it must, that a party cannot normally object if an agency has awarded all that its witness has claimed; if a carrier chooses to present its case on a basis more conservative than the facts would warrant, the Commission can take it at its word. However, it contends for a different result here on two grounds.

Calling attention to the Commission's over-all public interest findings that petitioners will benefit from "unified management" including "joint routes of affiliated lines, the prospect of single line service, elimination of interchanges, improved schedules, and a more flexible distribution of equipment," 330 I. C. C. at 795, B & M says these findings

show that the Commission thought that larger savings could be achieved than witness Wyer had estimated, but nevertheless failed to allow B & M corresponding benefits. We find in this no legal basis for reversal. While the Commission seems indeed to have believed that control savings would exceed those claimed by witness Wyer, it was not bound to attempt to price these out into increased earnings without the aid of detailed evidence and B & M had not furnished this.

B & M's other contention is that the Commission was required to reopen the record because such evidence was furnished by the witness in the N & W-C & O-B & O merger case. We think not. Apart from N & W's contentions that this testimony was based on inclusion of five roads in a larger system rather than of three in a smaller one and that it had been prefigured by earlier testimony long known to B & M, the issue had always been what savings could be effected by inclusion of the three roads as controlled subsidiaries, not what N & W would choose to effect. Commissioner Webb's general statement, largely directed at traffic matters, cannot be taken as a finding that any specific savings beyond Wyer's figures would be achieved. Furthermore, a reopening could hardly be so limited as B & M wished. What we said in section I of this opinion concerning the complaint of the Reading applies equally to B & M. Proceedings of this complexity must sometime come to an end; all that is required is that a party should have had a fair opportunity to prove its case and that the decision be supported by the evidence tendered. On the other hand it is reasonable to consider the conservatism of the estimate of control savings demonstrated by B & M as a further "cushion"—and this comment applies to E-L and D & H as well.

In its other major attack on the price fixed for B & M, N & W argues that it cannot fairly be directed to make any substantial payment for the stock since B & M has $46.5 million of First Mortgage Bonds, whose maturity has recently been extended to July 1, 1970, and other nonequipment obligations of $19.4 million falling due that year. The Commission's answer, "We foresee no danger to the N & W system" and "Whether able to meet all the demands of its capital structure or not, and whether in reorganization or out, B & M should continue to operate within one of the larger systems being developed in the East," 330 I. C. C. at 822, scarcely meets N & W's point that it should not be compelled to issue stock worth $10,000,000 for B & M shares that might be found worthless in a reorganization three years hence. Here again N & W is seeking certainties beyond what life affords. It is hard to believe that bondholders who have twice extended maturities to a deficit-ridden railroad beset with management conflicts would refuse to do this for a property well on the way to recovery under the control of one of the most efficient carriers in the east. Moreover, if the Commission's forecast of earnings is correct, the B & M stock would not be worthless in reorganization; one of the very purposes of §77 of the Bankruptcy Act is to preserve the equity of stockholders when insolvency has been precipitated by inability to meet maturities. See *Continental Illinois Nat'l Bank & Trust Co.* v. *Chicago, R. I. & P. Ry.*, 294 U. S. 648, 672 (1935).

The Possibility of Non-Inclusion of D & H and/or B & M.

N & W's final argument relates to the possibility that less than all three roads may in fact accept inclusion. The Commission's finding that inclusion of D & H was in the

public interest was predicated on actual inclusion of E-L and a similar finding as to inclusion of B & M hinged on actual inclusion of both E-L and D & H, 330 I. C. C. at 868. Affirmative action by E-L's stockholders has now assured its inclusion if the present terms stand. Although D & H's board of directors has unanimously voted to recommend similar action to its stockholders, there is a theoretical possibility that the necessary vote might not be forthcoming even though rejection would forfeit D & H's right to ask the Commission to compel Penn-Central to take it over on equitable terms, 330 I. C. C. at 868-69. And although D & H is included, B & M's stockholders might reject the terms despite the fact that in such event (although not in the case of rejection by D & H), B & M would lose the right to ask the Commission to compel its inclusion in Penn-Central. Yet, says N & W, all the figures of traffic gains, of losses to Penn-Central, and of protection of N & W revenues against Penn-Central diversion proceeded on the assumption that all three roads would be included, and the values fixed for E-L and D & H will be excessive if this does not occur.

The record, which contained not only a study of the gains from inclusion of all three roads (the "four-way" study) but studies of the gains from the inclusion of each, supports the earnings ratio established for E-L even on the assumption that neither D & H nor B & M is included. The "four-way" study, adopted by the Commission, details the traffic each of the roads is expected to reroute to the others. It demonstrates that only $1.25 million will be added to E-L revenues by inclusion of D & H and B & M. See chart at 330 I. C. C. at 834, line 2, columns 2-4. The data submitted in E-L's "two-way study" supports this. But a revenue loss of $1.25 million will reduce E-L's added net

income by only some $500,000—a difference that is not critical in light of the many "cushions" we have analyzed. Similarly, if B & M is not included, D & H's revenue from rerouting would have to be reduced by only $490,000, see chart at 330 I. C. C. at 834, line 3, columns 3-4, which amounts to a reduction of only $200,000 in net income. N & W's only challenge to this proceeds on a basis already considered and rejected, see fn. 20.

N & W answers that the effect of non-inclusion on the traffic gains of included roads is only a small part of the story. An even larger part, it says, is that non-inclusion of one or more lines would increase the losses the included ones would suffer to Penn-Central and decrease their ability to protect N & W from diversion; yet the Commission made no findings about this. The number of hypotheses to be considered were so numerous[36] that any attempt to make detailed studies of all of them not only would have protracted an already long proceeding but would have introduced so many elements of speculation concerning the traffic policies of each road and the susceptibility of shippers to them as to render the endeavor almost ludicrous. Although N & W as custodian of the figures and knowledge had the burden of presenting evidence that would permit a judgment of the degree to which

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36 Assuming E-L to be included in N & W in all cases, the following hypotheses, in addition to inclusion of all three roads, would have had to be separately analyzed:

D & H	*B & M*
(1) Independent	Independent
(2) Independent	In Penn-Central
(3) In Penn-Central	Independent
(4) In Penn-Central	In Penn-Central
(5) In N & W	Independent
(6) In N & W	In Penn-Central

petitioners would protect its traffic, it failed to do that even on the assumption that all three were included, let alone on less probable eventualities. As to the other question —the extent to which the lines that accepted inclusion would suffer increased losses to Penn-Central as a result of their brethren rejecting the terms—the Commission did deal with the only such hypothesis having reality.[37] It cited Commissioner Webb's finding that, "Without B & M in the N & W system, it can also be properly assumed that the traffic losses of E-L and D & H to a Penn-Central system would be somewhat larger than estimated with B & M controlled by N & W." 330 I. C. C. at 840. The assumption that the losses would be only "somewhat larger"[38] was within the Commission's expert competence in the absence of detailed contrary evidence. If B & M is not included but remains independent, it would have the strongest reasons for continuing and developing the historic interchange of New England traffic with D & H at Mechanicville, N. Y., especially with that carrier a part of a vigorous N & W system and possessed of trackage rights over PRR between Wilkes-Barre, Pa., and Hagerstown, Md., rather than exchanging such traffic at Rotterdam Junction, N. Y., with Penn-Central which would have several routes of its own into New England. While the situation would, of course, be different if B & M were to become part of Penn-

37 For reasons developed in section IV of this opinion we cannot take the prospect of non-inclusion of D & H at all seriously.

38 Commissioner Webb added, "Again, the amount of such additional loss cannot be determined from the record but it would not be so large as to alter the ultimate conclusion reached in this section of the report." Report, p. 66. Although the Commission did not explicitly adopt this recommendation, we find no basis for N & W's contention that the Commission disavowed findings not reproduced in Appendix A. To the contrary, adoption of this finding seems implicit in its order. See *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186 (1935).

Central, it is at least questionable that this will be permitted over N & W's objection, for reasons indicated in Mr. Justice Brennan's concurring opinion in *Baltimore & Ohio R.R.* v. *United States, supra,* 386 U. S. at 408-09; in any event it is inconceivable that the Commission would approve inclusion of B & M in Penn-Central without imposing conditions to safeguard the Mechanicville interchange to the maximum feasible extent. With all the weapons available in the Commission's armory to deal with this situation, it was not required to anticipate the problem and attempt to make findings dependent on so many contingencies as to be illusory.

N & W asserts, however, that the contrary evidence to which we have alluded is furnished by testimony of E-L Traffic Vice President Schmidt in the Penn-Central case, in which he asserted, based on a study of one month of 1961, that as an independent railroad E-L would probably suffer losses of $44 million to Penn-Central. But the Hearing Examiners in that proceeding described Schmidt's estimate as "highly exaggerated," p. 374.[39] In the instant proceeding Schmidt testified that if E-L alone merged with N & W, its losses to Penn-Central would be $8.5 million; he made no estimate as to the losses if E-L were included as a subsidiary.

Still further considerations support the Commission's action as to D & H. N & W does not dispute the evidence indicating that even if D & H were an *independent* carrier, it would lose only $1.3 million more in revenue to Penn-Central than if *all three roads* were included in an N & W

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39 In the course of the inclusion proceeding N & W counsel characterized Schmidt's study as "very curious" and said, "we were unable to trace [it] through with any degree of particularity and were unable to develop anything helpful in a numerical way in the cross of Mr. Schmidt." Transcript pp. 3275-76.

system. Even if that same figure be used for D & H as part of an N & W-E-L-D & H system, the impact on net income would be offset by the $565,000 in control savings—itself a low estimate even if N & W does not merge with D & H as it apparently could—which were not credited to D & H on the cash option that N & W requested and will almost certainly exercise.

To summarize, there is a sufficient finding, supported by adequate evidence, that B & M's non-inclusion would not undermine the fairness of the terms set for the inclusion of E-L and D & H. While the Commission made no finding as to E-L's Penn-Central losses in the event that D & H also were not included, rejection by D & H's stockholders is so unlikely, as we will later show, that we will not reverse on that ground. The mandate of §8(b) of the Administrative Procedure Act for reasoned findings and conclusions on all material issues should not be read as requiring agencies to deal in a detailed way with every possibility no matter how unlikely, or as directing a reviewing court to close its eyes to realities in pursuit of academic perfection. Presumably Congress intended that administrators should be able to administer. Moreover, it would have been wholly impracticable for the Commission to ask E-L and D & H to go to their stockholders with purchase prices sliding downward in the event of adverse action by stockholders of other roads. The Commission exercised the best over-all judgment it thought possible under the circumstances, and its valuations for E-L and D & H must be taken to have encompassed the possibility that all three roads might not enter their new home. Compare *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R.R.*, 318 U. S. 523, 538-39 (1943).

Complaint of E-L Bondholders.

John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, Aid Association for Lutherans and Woodmen of the World Life Insurance Society, holding large amounts of E-L bonds, ask for "equitable safeguards necessary to prevent the circumvention of their rights as bondholders." Their main point is that "N & W will have the incentive to use its control of New E L to increase the traffic and income of its own lines rather than those of New E L, e.g., by diversion of traffic and other benefits from New E L, to the detriment of New E L" and its bondholders. The alleged incentives are various—N & W can make more money by handling traffic on its own more efficient line west of Buffalo; while the present E-L stockholders have an interest in earning net income and paying the interest charges in order to clear the way for the declaration of dividends, N & W will prefer that New E-L should not have net income available for payment of the contingent interest and arrearages on the income bonds; and it will be glad to see the price of E-L bonds depressed in order to facilitate market purchases or tender offers.

Before submitting any plan for inclusion in N & W, E-L wrote thirteen of its major bondholders, including two of the plaintiffs, explaining both the greater advantages of merger and its disbelief that the Commission would approve this unless the E-L bondholders would consent to modification of the bonds. They refused. It was for this reason that E-L proposed stock control by N & W rather than merger, with attendant lesser economies and traffic gains and lower exchange ratios for its stockholders. The bondholders did not participate in the hearing before Commissioner Webb; on the last day for filing exceptions to

his Report, they sought leave to intervene and to file an exception asking the Commission to impose some sort of safeguard for their benefit.

We find no merit in the bondholders' complaint. The Interstate Commerce Act contemplates acquisitions of control by sale of assets subject to existing indebtedness as well as by merger or consolidation, which, as E-L correctly thought, would have been inequitable to N & W unless E-L's debt was modified. The bondholders do not contend that the indentures securing their bonds forbid a sale of assets. The smaller traffic gains and control savings estimated for E-L reflect N & W's inability in a control situation to do the very things the bondholders fear. While no one can guarantee that N & W may not abuse its position, courts of equity will still sit. The safeguards the bondholders seek are furnished in large measure by the principle of fiduciary responsibility recognized in such leading cases as *Farmers Loan & Trust Co.* v. *New York & Northern Ry.*, 150 N. Y. 410 (1896), and *Southern Pacific Co.* v. *Bogart*, 280 U. S. 438 (1919). If they wished more than this, they should have developed a record at the hearing and then come forward with specific suggestions. Failing to have done this, they cannot properly request a remand.

IV. Injunction or Stay of Consummation of the Penn-Central Merger

We now return to the merger cases and consider the Commission's determination that, with the Appendix G conditions revised and effective, the public interest requires consummation of the Penn-Central merger "at the earliest possible date," 330 I. C. C. at 361.

Ever since the Supreme Court reversed our denial of a temporary injunction, the parties have been in bitter dis-

agreement as to the meaning of its opinion. There was no need for immediate decision on our part since there could be no dispute that the Court intended the merger to be enjoined until the Commission had finalized the Appendix G traffic and financial conditions and had decided the applications of the three roads for inclusion in N & W. In our order of April 28, 1967 we therefore took a Delphic stance, enjoining consummation "pending the completion of the proceedings directed by the Supreme Court." In our memorandum order of July 3, 1967, we reviewed the conflicting contentions and the passages of the Court's opinion relied on to support them. We tentatively concluded that the Court had not directed us forthwith to enter an order enjoining consummation until all details of the inclusion of the three roads were resolved but, on the other hand, that as a matter of discretion we should extend the injunction at least until our own final determination in the merger cases "and thereafter for such further time, if any, and to such extent and on such terms as this Court may then direct." We have now decided not only the merger cases but also the *Inclusion* case, and must face the issue whether we must or should continue the injunction against consummation of the Penn-Central merger and, if so, for how long.

Because of our desire to obtain all available light on the Supreme Court's intentions, we requested the parties to furnish us with any excerpts from the briefs or arguments before it that might be helpful. While the help is limited on any view, since the Court cannot be assumed to have adopted the position of any party, the excerpts from the argument confirm our belief that the broad construction urged by some of the parties is unwarranted. Of particular importance is the passage where the then Solicitor General, now Mr. Justice, Marshall restated "the position of the

United States in this case" at the close of the argument—apparently departing somewhat from that taken in brief, 386 U. S. at 384-85. The position was "that the consummation of the Penn-Central merger ought to be delayed until the Commission has, (1) determined the fate of the smaller roads adversely affected by the merger, and, (2), has provided for the interim protection until the inclusion. This does not, of course, mean that we urge a stay of consummation until all of these judicial review proceedings are completed, the two-year forecast, the two and a half, the five year, and the if ever forecast. For the present our only point is that the Commission should not let Penn and Central merge until it has satisfied itself what to do about these railroads, the smaller ones. That does not mean the consummation must be delayed until the small roads are actually included in any of the systems. Once the Commission has finally decided their fate, the mechanics of the inclusion can wait so long as interim protective conditions are in ...." It is also of interest that counsel for E-L and D & H, along with B & M the objects of the Supreme Court's concern, stressed in their argument to the Court, as they had to us, that their complaint related to the Commission's failure to finalize the protective conditions. Only the argument of N & W and its allies that it was entitled to know exactly what Penn-Central would or would not include, since competition with a Penn-Central system containing the three roads would be more onerous than if these were in N & W, would be consistent with the broad reading now urged; the short answer to this would seem to be that the interests of N & W and those making common cause with it are protected by their right to oppose and challenge any future order including any of the three roads in Penn-Central. Consideration of the argument thus buttresses our

conclusion drawn from the passages of the opinion, 386 U. S. at 378, 390 and 392, cited in our previous order, that the Supreme Court has not directed a further injunction but has left that issue to be determined by application of the principles governing judicial review of administrative action to the facts before us.

E-L and D & H (but not B & M), together with N & W and its allies, argue, with various nuances of difference, that the public interest forbids consummation until doubts as to the future of the protected roads are finally resolved. The remaining doubts are of two sorts. One, developed in section III of this opinion, relates to stockholder action—the stockholders of D & H may reject inclusion, thereby also precluding inclusion of B & M, and stockholders of the latter may do so on their own. The other uncertainty concerns possible Supreme Court reversal of our decisions, more particularly a reversal in the *Inclusion* case which by requiring less favorable terms would call into question the action already taken by stockholders of E-L and would enhance the risk of adverse action by stockholders of D & H and B & M. Doubts of the first type are those to be considered in making our own decision whether to continue the injunction. If we rule against this, the second set of considerations is relevant to determining whether to grant a stay pending appeal.

We find ourselves unable to take seriously the possibility that D & H stockholders will reject their directors' unanimous recommendation to accept the inclusion terms. The cash price fixed by the Commission works out at $41.79 per share as against an average 1967 market price until the date of decision of about $34, 331 I. C. C. at 33. The prospect of operating as an investment company with some $66,000,000 in cash and substantial tax credits appears con-

siderably brighter than that of continuing as a small independent railroad seeking better terms from N & W or attempting to work out a voluntary agreement with Penn-Central. While the situation as to B & M differs since the price fixed by the Commission for its stock is well below the current market, that carrier not only does not seek continuation of the injunction but actively opposes it, believing that consummation of the Penn-Central merger is needed to prod N & W into offering what it considers realistic terms. Even if B & M should be overly sanguine about this, a court has no duty, very likely even no right, to give it a protection it does not wish, and its non-inclusion in N & W will not impede the inclusion of E-L and D & H nor, on our view, require any change in the terms the Commission has fixed. When the case was last here, the principal, indeed almost the sole, bone of contention among the parties, and the only issue that caused division among us, was the argument that although the Commission had found Appendix G conditions to be necessary, it had not in fact prescribed them in definitive form—in Judge Weinfeld's words, "that the rescission of one of the conditions and the reopening for further consideration of the other conditions originally imposed by the Commission for the protection of" E-L, D & H, and B & M "as a prerequisite to the merger requires the granting of the interlocutory injunction." The Commission has now done what the Supreme Court directed it to do, and has expressly found that, subject to the conditions it has prescribed, "the public interest requires that the applicants be permitted to commence achieving the substantial savings which their merger will make possible at the earliest possible date;" that "the shipping public should not be denied the improved service which ultimately the merged company can provide;" that it was "unwilling to take the risk that further delay in consummation of the

merger may mean that it will never occur—and that New Haven will not be included in a larger rail system;" and that it was particularly unwilling to do this in view of the demonstration in its report in F. D. 21510 "that inclusion of E-L, D & H and B & M in the N & W system is both consistent with the public interest and feasible, and in view of the fact that the instant report provides for those lines pending their actual inclusion even stronger interim protection than did our prior report." 330 I. C. C. at 361. We would not feel warranted in overruling the Commission's informed judgment, concurred in initially by all three of the affected railroads and still accepted by B & M, that proper Appendix G conditions take sufficient care of them while they work out their future, which, if our order in the *Inclusion* case stands, is practically assured for the only two that protest.

The final question is whether, although denying a further injunction, we should grant a stay pending appeal to the Supreme Court. The criteria were authoritatively stated by Mr. Justice Brandeis in *Virginian Ry.* v. *United States*, 272 U. S. 658, 673 (1926):

> "To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

Although appraising the correctness of one's own decision is a tricky business, we entertain no doubt with re-

spect to our rulings in the merger cases. The only issue that seems at all debatable is the capital loss indemnity and, as we see it, the Supreme Court could correct any error on our part even after consummation; moreover, the issue would become academic as to the protected roads if the Court should affirm us in the *Inclusion* case. While that case has presented considerably more difficulty as our discussion has shown, we have no "serious doubt" we have reached the right result. The fact that the criticisms mainly relate to subsidiary findings, or the lack of them, rather than to the Commission's ultimate conclusions works against the probability of reversal. In *Massachusetts Trustees* v. *United States,* 377 U. S. 235, 248 (1964), the Court made plain that *SEC* v. *Chenery Corp.,* 318 U. S. 80 (1943), so heavily relied on by N & W, was intended only to establish the important point that a reviewing court could not affirm an agency on a principle the agency might not embrace—not to require the tedious process of administrative adjudication and judicial review to be needlessly dragged out while court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings.

Moreover, if the Supreme Court should disagree with our decision in the *Inclusion* case, it would not itself establish different terms but would direct a remand to the Commission. If the remand were for the purpose sought by B & M, this would in no way prevent inclusion but rather would facilitate it. On the other hand, if the remand were on N & W's appeal, our discussion has revealed many ways by which, in our view, the Commission could support terms as favorable as it has established even if the Court should have held some of its subsidiary findings to be insufficient. We thus cannot foresee any substantial likelihood that action by the Supreme Court will worsen the chances of the three roads' inclusion in N & W.

Since our decision does not conflict with that of any other court, we are thus left with the question whether there is "some other special reason" for a stay. As to this we would be inclined to regard the irreversibility of the Penn-Central merger, see 386 U. S. at 391-92, and the Supreme Court's obvious interest in this case as reasons sufficient to warrant a few months' delay if it were not—and the "if" is a literally vital one—for the critical situation of the New Haven.

No one has contested the forecast of the NH Trustees that their cash will run out at the end of 1967; no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central. Despite our utmost efforts to expedite the argument and decision of these cases, we are now in late October, and the appeal of our previous order of early October 1966, handled by the Supreme Court on an expedited basis, was not decided until late March 1967. While these facts are unpleasant, they are nonetheless inexorable. For our part we are unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed; indeed we believe we have no right to do so. Whether the Supreme Court may think differently or would wish to hear an appeal either of the entire case or of some part of it on an even more expedited basis that would permit a decision prior to December 31, 1967, no one else can determine. We therefore stay consummation of the merger only for fifteen days and if within that period a notice of appeal to the Supreme Court is filed and application for a stay is made to it, until the determination of such application or other order of the Court or the Circuit Justice.

Judgment

The clerk is directed to enter judgment as follows:

(1) All complaints and intervening complaints in 66 Civ. 2860, in 66 Civ. 2903, and in 66 Civ. 2914 except that of The Central Railroad of New Jersey, are dismissed. The court finds there is no just reason for delay in the entry of judgment dismissing the other complaints in 66 Civ. 2914 and so directs, F. R. Civ. P. 54(b).

(2) The complaint and intervening complaint in 66 Civ. 3413 are dismissed without prejudice to any action plaintiffs may be advised to take with respect to any further order in F. D. No. 21989 relating to temporary assistance to the New Haven or the inclusion of the New Haven in Penn-Central.

(3) All complaints (including that of N & W as involuntary plaintiff) and intervening complaints in 67 Civ. 2451 are dismissed. Enforcement of the order of the Commission in F. D. 21510 with respect to N & W is stayed until fifteen days from the date of this order, and if within that period N & W files a notice of appeal to the Supreme Court of the United States and prosecutes said appeal in accordance with the rules of said Court, until the determination thereof.

(4) The portion of the Commission's order in F. D. 21989 authorizing immediate consummation of the Penn-Central merger and the beginning date of the 180-day period fixed by the Commission in its order served June 12, 1967, for exercising the authority there conferred, are stayed until fifteen days from the date of this order, and if within that period a notice of appeal to the Supreme Court is filed and an application for a further stay is made to that Court, until the determination of such application or other order of the Court or the Circuit Justice. Except to the limited

extent provided in this paragraph all applications for injunctions against consummation of the Penn-Central merger are denied.

HENRY J. FRIENDLY
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

RICHARD H. LEVET
Senior U.S.D.J.

October 19, 1967.

APPENDIX C

ADMINISTRATIVE PROCEDURE ACT

Section 8(b), 5 U.S.C. § 557(c).

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(c), 5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action

or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 10(d), 5 U.S.C. § 705.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Section 10(e), 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

JUDICIAL CODE

28 U.S.C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory

or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. § 2101(b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. § 2284.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges

shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. § 2321.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases

and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. § 2322.

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. § 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2324.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. § 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

INTERSTATE COMMERCE ACT

Sections 5(1), 5(2), 49 U.S.C. §§ 5(1), (2).

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing

upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or

two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject

to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon

equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers

prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(9), 49 U.S.C. § 5(9).

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

No. 779

FILED
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JOHN F. DAVIS, CL

Supreme Court of the United States

October Term, 1967

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant

v.

UNITED STATES OF AMERICA, et al.,
Appellees

On Appeal from the United States District Court
for the Southern District of New York

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant Norfolk and Western Railway Company (N&W) appeals from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission directing N&W, through a subsidiary, to acquire control of Erie-Lackawanna Railroad Company (EL), The Delaware and Hudson Railroad Corporation (D&H), and Boston and Maine Corporation (B&M), upon terms and conditions specified by the Commission, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The memorandum order of July 26, 1967, and the October 19, 1967, opinion of the statutory three-judge

court convened in the Southern District of New York are not yet reported, and copies are attached hereto as Appendices A and B. The report of the Interstate Commerce Commission, dated June 9, 1967, is reported at 330 I.C.C. 780 and the Commission's report on reconsideration dated August 10, 1967, as modified on September 1, 1967, is reported at 331 I.C.C. 22. Copies of the Commission's reports and orders have been lodged with the Clerk of the Court.

Jurisdiction

This suit was brought under Title 5, U.S.C. § 704 and Title 28, U.S.C. §§ 1336, 2284 and 2321-25 to annul and set aside the supplemental order of the Interstate Commerce Commission, dated June 9, 1967, in Finance Docket No. 21510, et al., as modified by its orders dated August 10, 1967, and September 1, 1967. The judgment of the district court dismissing this complaint was entered on October 19, 1967. Notice of appeal was filed in that court on October 31, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, U.S.C. §§ 1253 and 2101(b).

Questions Presented

1. Did the district court err in failing to consider the impact of the Commission's erroneous projection of "normal" earnings on the Commission's ultimate conclusion that directing N&W to acquire EL, D&H and B&M as subsidiaries would preserve the viability of those three carriers and, accordingly, be consistent with the public interest?

2. Did the district court err in affirming the Commission's report and order although that order permits inclusion of fewer than all of the petitioners in the N&W system, even though the report contains no findings with respect to either the public interest in such partial inclusion or the proper terms therefor?

3. Did the district court violate the rule in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), in sustaining the Commission's conclusions as to petitioners' prospective "normal" earnings on the basis of evidentiary findings and conclusions neither considered nor adopted by the Commission?

4. Did the district court err in sustaining the Commission's findings as to "normal" earnings where such findings rested only on the Commission's assumptions and not upon evidence of record?

5. Did the district court err in sustaining the Commission's determination of the financial terms for inclusion despite the Commission's failure to rule upon exceptions directed to those terms?

6. Did the district court err in sustaining the Commission's departure from established administrative precedent in allocating consolidation benefits and fixing labor conditions where the Commission did not justify its action with rational findings?

7. Did the district court err in interpreting the mandate of this Court in *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372 (1967), to permit the Commission to refuse to consider alternatives to inclusion of EL, D&H and B&M in the N&W system, where the effect of such re-

fusal was to preclude determination of the ultimate fate of these carriers?

Statutes Involved

The statutes involved in this case are: Administrative Procedure Act, §§ 7(d), 8(b), 10(a), 10(c), 10(e), 5 U.S.C. §§ 556(e), 557(c), 702, 704, 706; Judicial Code, 28 U.S.C. §§ 1253, 1336, 1398(a), 2101(b), 2284, 2321-25; Interstate Commerce Act, § 5(2), 49 U.S.C. § 5(2). Also involved are Rules 19a and 82 of the Federal Rules of Civil Procedure. The text of these statutes and rules is attached hereto as Appendix C.

Statement

This is the so-called *Inclusion* case, the decision in which, according to this Court, would determine "the ultimate fate" of EL, D&H and B&M. *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372, 378 (1967). The Commission's order, however, does not accomplish this result. Moreover, even if the stockholders of one or two of the three carriers elect to sell to N&W pursuant to the terms of the order, the order fails to protect the public interest.

The proceedings before the Commission were initiated by EL, D&H and B&M filing petitions for inclusion in N&W. Such petitions were authorized by a condition (Appendix O) attached to the Commission's order approving N&W's merger with the Nickel Plate and related transactions. *Norfolk & W. Ry. Co. and New York, C. & St. L.R. Co. Merger*, 324 I.C.C. 1 (1964). Under Appendix O, the Commission retained jurisdiction to direct inclusion of the three carriers if "found consistent with the public interest . . . under such terms as may be

found equitable to all parties involved" (324 I.C.C. at 148). The right to judicial review of Commission action under Appendix O was expressly protected (324 I.C.C. at 148).[1]

After hearings on the petitions for inclusion, the Commission held that "mergers were nowhere in sight," because of the inequity of requiring N&W to assume the $464 million of long-term debt of the three railroads (330 I.C.C. at 801). The Commission did, however, order N&W to issue the equivalent of 1,335,763 shares of its common stock, having a current market value in excess of $130 million, to acquire the equity interest in EL, D&H and B&M through subsidiary corporations wholly owned by N&W. The Commission's conclusions that the prescribed financial terms were fair were based upon its projection of the "normal" earnings of the three petitioning railroads (330 I.C.C. at 799-800). The Commission's conclusion that inclusion of the three railroads "in N&W by way of control" would be in the public interest was also based upon the Commission's finding that the three railroads would have "normal" earnings sufficient to permit them "to continue providing adequate transportation service" as subsidiaries of N&W (330 I.C.C. at 795).

The so-called "normal" earnings found by the Commission far exceed the carriers' actual earnings,

[1] "If the foregoing condition, as more specifically set out in appendix O, is accepted by the applicants, it should be clearly understood that the Commission does not intend that such acceptance will foreclose or limit review of any decision which the Commission may make in disposing of a petition filed pursuant to the aforesaid condition of approval" (324 I.C.C. at 28).

even before any allowance is made for the impact of the Penn-Central merger upon their revenues:

	"Normal" Earnings as found by the Commission (Millions) (330 I.C.C. at 816, 819, 821)	Actual Earnings (Millions)			
		Ten-Year Average (1955-1964)	1965	1966	12 Months Ended Sept. 30, '67
EL[2]	$9.6	($9.4)	$0.0	$3.3	($8.6)
D&H	6.3	4.4	5.2	5.1	3.4
B&M	1.5	(2.0)	(0.6)	(1.5)	(1.7)[3]

( ) denotes loss

The great disparity between the actual earnings of EL, D&H and B&M and the "normal" earnings relied upon by the Commission, both in determining the public interest and in fixing the prices N&W has been ordered to pay for these three railroads, resulted from a series of adjustments made by the Commission to EL's 1965-1966 earnings, and to the 1965 earnings of B&M and D&H (330 I.C.C. at 813-814, 819, 821). The validity of the adjustments that the Commission made and its failure to make other adjustments, particularly in the light of these carriers' actual earnings in more recent periods, constituted the principal area of dispute in these proceedings.

[2]EL's earnings are shown after full contingent interest charges. Its reported earnings for 1965 and 1966 were $3.3 and $6.6 million, respectively (330 I.C.C. at 873), and its reported results for the first nine months of 1967 showed a deficit of $7.7 million. These reported earnings, however, are not comparable to the $9.6 million found by the Commission and do not show the earnings available to stockholders because they do not reflect $3.3 million of the $8.8 million of full contingent interest charges, which must be taken into account in determining EL's "normal" earnings (330 I.C.C. at 812, 816).

[3]12 months ended June 30, 1967.

The specific adjustments made by the Commission to produce its findings of "normal" earnings, as well as the Commission's general findings with respect to the public interest, presume that all three railroads will in fact be included in N&W "under conditions of four-way control" (*e.g.*, 330 I.C.C. at 792-794, 836). The Commission made no provision for the situation in which only EL, or only EL and D&H, would be included as a result of its order, although the inclusion of each of the three petitioning railroads is at the election of their respective stockholders.

On June 13, 1967, immediately following the service of the Commission's order, N&W filed a complaint in the District Court for the Western District of Virginia (No. 67-C-51-R), the only judicial district in which N&W had the right to bring the action under the venue statute (28 U.S.C. § 1398), asking that the order be set aside. On June 23, 1967, D&H filed a complaint in the Southern District of New York seeking judicial review of that part of the Commission's order which had prescribed the financial terms in such a way as to preclude D&H from obtaining tax benefits from the transaction. On July 26, 1967, the District Court for the Southern District of New York issued an order joining N&W as an involuntary plaintiff in the D&H action (App. A).[4] In

[4]There is not even a hint in the Committee Notes that the 1966 revision of Rule 19(a), upon which the district court relied to support its order, changed the concept of involuntary plaintiff so as to permit joinder of N&W in the D&H action. The holding of the district court that the concept was inadvertently expanded will come as a surprise to Professor Moore, who stated in 1967 (3 Moore, Federal Practice, p. 2101) that "The doctrine [of involuntary plaintiff] can properly be applied only where there is such a relationship that the absent party must allow use of his own name as plaintiff [as in patent owner-patent licensee situations]." *Id.* at Section 19.06, p. 2215.

its order dated August 10, 1967, the Commission satisfied D&H by altering the form of the transaction to produce the requested tax benefits (331 I.C.C. at 23-38), thus mooting D&H's action. The District Court for the Southern District of New York nevertheless required N&W to proceed as an involuntary plaintiff in the D&H action in that court, overruled N&W's objections to joinder and venue (App. B, pp. 4-8), and entered judgment dismissing N&W's complaint on the merits (App. B, p. 71).

The district court treated the complaint for judicial review as addressed solely to the financial terms of the order directing N&W to acquire the stock and control of the three railroads (App. B, p. 30), and brushed aside the public interest issues raised by the complaint. The district court refused to give separate consideration to N&W's complaint that specific steps in the Commission's determination of "normal" earnings lacked reasoned findings supported by substantial evidence, and based its refusal on the grounds that "logical perfection in every step" is not required (App. B, p. 49), and that "any overestimate of E-L's earning power was fully compensated" by "substantial tax benefits" which would accrue to N&W if EL failed to produce the "normal" earnings which the Commission had projected (App. B, p. 51).

Recognizing that the Commission's order, even if affirmed, would not result in the inclusion of B&M, and might not result in inclusion of D&H if its stockholders so elected, the district court struggled with the Commission's failure to make findings responsive to this situation. After undertaking to supply findings of fact

which the Commission itself did not make upon issues which it did not even consider, and after making a prediction that D&H stockholders would vote for inclusion, the district court sustained the Commission's order (App. B, pp. 56-61).

This appeal followed. In view of the recognized need for expedition in restructuring the Eastern railroad system (386 U.S. at 392), N&W does not raise before this Court the questions arising from the district court's unprecedented and erroneous holdings on its joinder as an involuntary plaintiff and venue. Instead, N&W asks that this Court review and set aside the Commission's unlawful order and remand the case to the Commission to provide a solution responsive to the realities of the situation.

The Questions Presented Are Substantial

This *Inclusion* case was regarded by both the Commission and the district court as the key needed to unlock the benefits of the Penn-Central merger without destroying three railroads now providing essential transportation service to the public. In its opinion last Term, this Court referred to the then-anticipated Commission order in the *Inclusion* case, stating (386 U.S. at 392):

> "If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties. After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system

> in the northeast section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation."

It was thus recognized that questions directed to the propriety of the Commission's action in attempting a restructuring of the railroad system in the northeast present substantial issues of great public importance. And, quite apart from the magnitude and importance of the transactions themselves, the district court has committed errors of law which present substantial issues calling for plenary review by this Court.

1. *The Commission Has Not Found That Any Public Interest Would Be Served By Directing N&W To Acquire The Stock Of Deficit Railroads*

The district court based its decision on the false premise that "no substantial attack is made on the Commission's basic finding . . . that inclusion of E-L, D&H and B&M in the N&W system on proper terms is in the public interest" (App. B, p. 30). The district court thus treated all challenges to the Commission's findings of the "normal" earnings of those roads as related solely to the question of the price to be paid by N&W. This is not the premise on which the case was tried by the parties or decided by the Commission.

In deciding the public interest issue, the Commission concluded that the three railroads "if included in N&W by way of control, would be able to continue providing adequate transportation service," and the Commission based this conclusion on the explicit finding that "the normal earnings of each petitioner after inclusion will be sufficient to meet their fixed charges" (330 I.C.C. at 795).

The district court, disregarding the direct relationship between the Commission's findings of "normal" earnings and its conclusions with respect to the public interest issue, treated all questions concerning the Commission's findings of "normal" earnings as related solely to the fairness of the price N&W is required to pay. The district court thus dismissed all challenges to the several factors and adjustments that led the Commission to conclude that EL, D&H and B&M would each enjoy substantial "normal" earnings on the ground that the prescribed stock exchange ratios represented "informed judgment on all elements of value." Paramount among the elements considered, said the district court, were the tax benefits N&W would realize "even if E-L earned nothing," so that "any overestimate of E-L's earning power was fully compensated" by "substantial tax benefits" to N&W (App. B, p. 51). In short, N&W has been told that it has no grounds for complaint if, instead of the "normal" earnings forecast by the Commission, these railroads experience no earnings or accumulate deficits, because in such event N&W, through consolidated tax returns, can recoup the enforced purchase price from the United States Treasury in the form of deductions from N&W's own taxable income.

It is unfair to require N&W to risk an investment in the petitioning railroads on the premise that, even if they earn no income or sustain losses, N&W's investment will be protected by offsetting tax benefits. But even if it is assumed that N&W could recover its purchase price from the Treasury through reduced taxes, the public interest in maintaining rail competition in the areas served by EL, D&H and B&M will not be satisfied unless

these railroads have adequate earnings. The Commission has directed N&W to acquire these railroads as wholly owned subsidiaries. The primary reason for providing such inclusion, as is clear from the Commission's findings in the *Penn-Central* proceeding, is to preserve the transportation service which the three petitioners provide the public and which Penn-Central threatens to destroy. However, unless each railroad has sufficient earnings to make it a viable subsidiary of N&W in competition with Penn-Central, inclusion will not preserve its service for the public.[5]

The Commission and the district court simply refused to face the reality that EL, D&H and B&M are, collectively, a deficit operation even before the admittedly severe impact of Penn-Central on their revenues from competitive traffic.[6] Although the Commission based its order upon the assumption that as an independent railroad EL would have "normal" earnings of $6.2

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[5]There are prior examples of railroads going bankrupt despite stock ownership or control by major railroad systems. *E.g.*, Erie R. Co. Reorganization, 239 I.C.C. 653, 655 (1940); Central Railroad Company of New Jersey Reorganization, No. B 401-67 (N.D. N.J. March 1967).

[6]The Commission found that the three carriers would lose $16.34 million to Penn-Central as subsidiaries of N&W, offset by only $8.18 million of traffic gains (330 I.C.C. at 804, 806). The Commission found that the traffic losses need not be considered in determining the price that N&W must pay because of offsetting benefits to N&W in protecting N&W traffic, but that finding is beside the point in considering whether, after Penn-Central, EL, D&H and B&M will have sufficient earnings to meet their fixed charges and provide adequate transportation service.

Moreover, the Commission's finding is not supported by evidence. Such offsets were not even claimed by EL, whose own witness testified that "inclusion of EL as a subsidiary of N&W would not significantly offset that impact [of Penn-Central] on either road" (EL Stmt. 12, p. 42).

million,[7] EL actually lost $8.6 million for the most recent 12-month period, and at its present rate EL's loss for 1967 will apparently exceed $12 million. Moreover, these deficits were recorded by EL *after* receiving the full subsidy for commuter deficits from the State of New Jersey upon which the Commission relied in projecting "normal" earnings (see App. B, pp. 41-42). Similarly, the Commission's finding that B&M would have "normal" earnings of $0.4 million as an independent railroad (App. B, p. 52), is incredible in view of the fact that B&M has experienced deficits every year since 1957, including a deficit of $1.5 million in 1966 (330 I.C.C. at 879), and is operating at an even greater deficit in 1967.

The district court acknowledged "the decline in E-L earnings during 1967" (App. B, p. 39), but paid no further attention to the effect of this decline on EL's ability to provide necessary transportation service as a subsidiary of N&W facing Penn-Central competition. In marked contrast, the district court asserted that an attack upon the need for the Penn-Central merger itself "has been shattered by the results for the first half of 1967" (App. B, p. 9, n. 6), although the decline in the Penn and Central earnings was not so great as to convert the combined net income of Penn and Central into a deficit. The district court's treatment of 1967 results—taking them into account in upholding Penn-Central and disregarding them in upholding EL's inclusion—can only be explained by the district court's belief that N&W would be compensated

[7] $9.6 million "normal" earnings after full contingent charges (330 I.C.C. at 816), less operating savings ($1.8 million) and traffic gains ($1.6 million) found to result from N&W control of EL (330 I.C.C. at 813).

for "any overestimate of EL's earning power" by using the losses as tax deductions (App. B, p. 51).

There is no basis for the assumption that directing N&W to acquire stock control of three railroads which have, collectively, been operating at a deficit for the past decade, and which are currently operating at a deficit, will protect those carriers from the impact of Penn-Central and preserve their service to the public. The Commission has not faced the question of whether directing N&W to acquire deficit carriers is in the public interest, because the Commission found that each carrier would have substantial "normal" earnings. The district court avoided the critical question of the public interest by concluding that any overstatement of the "normal" earnings of these carriers was relevant only to the question of financial terms.

Because the district court treated the whole subject of EL, D&H and B&M earnings as relating merely to the fairness of terms and not at all to the public interest, there has been a complete failure to consider the ability of these railroads to obtain the earnings necessary for their survival as subsidiaries of N&W in competition with Penn-Central.

2. *There Are No Findings To Support Inclusion Of EL Alone, Or EL And D&H Without B&M.*

Assuming the validity of every feature of the Commission's order that N&W acquire the stock of EL, D&H *and* B&M, the order is still fatally defective in that it presumes inclusion of all three roads as a package whereas, in fact, at least one and possibly two components of that package will not be included under the order.

Every finding in the Commission's report, both with respect to the public interest in inclusion and the financial terms, assumes the inclusion of all three railroads as a package. For example, the traffic gains, as found by the Commission and used in computing "normal" earnings, explicitly assume "conditions of four-way control" (330 I.C.C. at 834, 836). Similarly, the calculation of losses of traffic to Penn-Central assumes that EL, D&H and B&M are all to be included as subsidiaries of N&W (330 I.C.C. at 806). And the Commission's whole discussion of the competitive situation of these three railroads emphasizes "their interdependence in providing a substantial part of [their] service" (330 I.C.C. at 793). The extent of this "interdependence" was clearly shown by the following findings (330 I.C.C. at 832):

> "EL's most important interchange point is Buffalo, where N&W is its most important connection. EL's third largest interchange is at Binghampton, N. Y. with D&H . . . .
>
> "D&H's largest interchange is with B&M at Mechanicville, N.Y. . . . D&H's second largest interchange is with EL at Binghampton, N.Y. . . . One of D&H's important transportation functions, therefore, is to serve as a link between EL and B&M.
>
> "B&M's most important interchange point is at Mechanicville with the D&H . . . ."

The public interest and the terms for inclusion of EL alone, or EL and D&H without B&M, depend upon the business that would be available to such combinations. And the traffic gains would necessarily be

less, and the losses to Penn-Central more, under either of these bobtailed combinations than under the four-way N&W-EL-D&H-B&M package which the Commission assumed. Without B&M, D&H would be a bridge line to nowhere, lacking enough traffic to justify its existence. And EL's viability would be severely curtailed if B&M or B&M and D&H were either no longer viable or allied with Penn-Central.

Thus, even if all of the Commission's findings were entirely correct under the premise upon which they were made, it is now apparent that the premise that all three railroads will be included under the Commission's order has no reality. B&M is not coming into the present N&W system on the prescribed terms; and whether D&H will come in on the prescribed terms is speculative.[8] And yet the Commission has made no findings as to what the "normal" earnings of EL and D&H would be as subsidiaries of N&W without B&M, or what the "normal" earnings of EL would be if it were included as a subsidiary of N&W without B&M and D&H. All of the Commission's findings about the "interdependence" of the three railroads indicate that the three railroads were consistently regarded as a package, and yet the Commission has directed N&W to include only a portion of that package, at the election of the stockholders of B&M and D&H.

The district court explicitly conceded that the Commission had made no findings whatever with respect to

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[8]As shown in the Jurisdictional Statement in the *Penn-Central* case, B&M is seeking the higher price that only the elimination of competition through affiliation with Penn-Central could justify and D&H's chief executive officer has indicated a similar purpose.

the ability of EL to survive if that carrier alone were to be included in the N&W system, but it refused to accept the normal consequences of that admission, stating (App. B, p. 61):

> "While the Commission made no finding as to E-L's Penn-Central losses in the event that D&H also were not included, rejection by D&H's stockholders is so unlikely, as we will later show, that we will not reverse on that ground."

Apart from the court's own investment analysis (App. B, pp. 66-67), the only "showing" made to support the district court's assumption that D&H stockholders will approve the prescribed terms was its reference to the representation of D&H counsel that the D&H Board of Directors had "unanimously resolved that D&H would recommend inclusion terms as fixed by the Commission" (Tr. 9/28/67, p. 150). However, D&H counsel was careful not to suggest that this meant that the stockholders would accept that recommendation, and he advised the court that the directors had decided not to submit the question to a stockholder vote at this time unless ordered to do so by the Commission (*id.* at 151-152). In view of the public statements of D&H's president, who represents its principal stockholder, any prediction that D&H stockholders will vote for inclusion is mere speculation.[9]

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[9]President Dumaine informed D&H's stockholders in a letter, dated August 21, 1967 (Bensel affidavit of 9/5/67, p. 8) that the Board would continue to explore "other alternatives that may be available to D&H" prior to presenting the matter to the stockholders. Mr. Dumaine subsequently made it plain that one of the alternatives he had in mind was that "D&H should become part of the merged Pennsy-Central" (Bensel affidavit of 9/5/67, pp. 8-9).

In short, although it recognized that the Commission had committed reversible error, the district court refused to reverse because of the court's own speculation that D&H stockholders would render the error harmless by voting to accept the terms prescribed by the Commission. But if the district court's guess is wrong and the D&H stockholders reject those terms, N&W will nevertheless be required to acquire EL as a subsidiary even though the Commission has never considered whether such inclusion, on the terms prescribed, is either in the public interest or equitable to N&W. Unless and until the D&H stockholders have actually voted to accept the prescribed terms, the Commission's failure to make findings with respect to inclusion of EL alone constitutes error which requires reversal.

The district court did recognize that B&M will not be included under the Commission's order (App. B, p. 67). But the court held that ". . . there is a sufficient finding . . . that B&M's non-inclusion would not undermine the fairness of the terms for the inclusion of E-L and D&H" (App. B, p. 61). The only Commission finding remotely related to the point, however, was the following passage in Commissioner Webb's report (330 I.C.C. at 840):

> "If B&M were not controlled by N&W but remained an independent carrier the net reduction in EL and D&H annual gross freight revenues would no doubt be greater. The record does not permit any reliable estimate of the increased loss. * * * Without B&M in the N&W system, it can also be properly assumed that the traffic losses of EL and

D&H to a Penn-Central system would be somewhat larger than estimated with B&M controlled by N&W. * * *" (Deletions by the Commission.)[10]

This finding certainly does not permit the conclusion which the court drew. Nor does the district court add anything by its effort to provide substance to the finding by speculating about B&M's "strongest reasons" for favoring a D&H interchange "If B&M is not included but remains independent" (App. B, p. 59).[11] The whole premise of the discussion is beside the point because B&M cannot remain independent. The Commission found in *Penn-Central*, and each of the homeless roads proved in this *Inclusion* case, that the consummation of the giant Penn-Central merger foreclosed their continued operation as independent carriers. That was what the decision

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[10]In the portion of the paragraph deleted by the Commission, Commissioner Webb had said that the additional loss "would not be so large as to alter the ultimate conclusion reached [with respect to the public interest]" (Webb Rep., p. 66). N&W took specific exception to that portion of Commissioner Webb's report as not supported by evidence (N&W Exceptions, p. 70, n. 39), and the Commission responded to N&W's exception by deleting that portion of the paragraph in adopting the finding as its own.

Under these circumstances the assertion of the district court that, although deleting the challenged statement, the Commission adopted it by implication (App. B, p. 59, n. 38) is manifestly incorrect, as is the court's reliance upon Pacific States Box & Basket Co. v. White, 296 U. S. 176, 186 (1935). That case upheld a state order against constitutional attack on the ground that the existence of supporting facts could be presumed and that the state statute required no findings of fact. The present case is governed by the Administrative Procedure Act which requires that federal agencies act upon evidence in the record and make findings with respect to each material issue (5 U. S. C. §§ 556(e), 557(c)).

[11]In the course of this discussion, the district court volunteered that D&H would be "possessed of trackage rights over PRR between Wilkes-Barre, Pa., and Hagerstown, Md." (App. B, p. 59). No such trackage rights have been authorized, and the Commission has found that there would be insufficient traffic to justify the operation of any trains over such a trackage right even if authorized (330 I.C.C. at 853).

last Term was all about. It was because the Commission had found that Penn-Central would destroy the three railroads as independent carriers that this Court directed delay in the consummation of Penn-Central until the permanent home of the three roads had been determined (386 U.S. at 375, 388, 390). Since the findings in *Penn-Central* establish that continued operation of the three railroads as independent carriers is precluded, it is wholly unresponsive to the problem to make findings on the premise that B&M "remains independent."[12]

The district court concedes that "the situation would, of course, be different if B&M were to become part of Penn-Central," but dismisses this possibility on its own finding that inclusion of B&M in Penn-Central might not be permitted or might somehow be conditioned to protect B&M's interchange with D&H "to the maximum feasible extent" (App. B, pp. 59-60). The inclusion of B&M in Penn-Central cannot be discounted by the court so long as the Commission has left the door open for B&M to negotiate for inclusion in Penn-Central and has refused, despite N&W's repeated requests, to foreclose B&M's inclusion in Penn-Central. No one has ever suggested what protection could be given in that event, or how it could be made effective.

B&M has made perfectly plain its purpose to ruin D&H and severely injure EL if "B&M were a

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[12]For the same reason, there is no reality to any of the "hypotheses" listed by the district court on the premise that D&H or B&M would remain "independent" (App. B, p. 58, n. 36).

member or ally of Penn-Central."[18] And the hard fact is that B&M is already an ally of Penn-Central, having realigned itself as a defendant in the *Penn-Central* litigation (App. B, p. 10). The impact upon EL and D&H of B&M's activity as an ally of Penn-Central will be felt immediately upon consummation of the Penn-Central merger since it is now perfectly apparent that, contrary to the premise upon which the Commission adopted the Appendix G conditions (330 I.C.C. at 355), B&M does not regard itself as a prospective "affiliate of N&W."

The Commission's order is therefore unlawful in failing to make findings responsive to the real issues which the case presented—the viability and price of EL alone, or EL and D&H without B&M. The district court erred in not setting aside the Commission's order on this ground.

3. *The District Court's Disposition Of The Issues Violates The Standards Governing Judicial Review Of Administrative Orders.*

As discussed above, the Commission's conclusion that the inclusion of EL, D&H and B&M in the N&W

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[18] "There is little point in putting D&H in any system without also including B&M therein. As the Commission observed, D&H's most important interchange is with B&M in Mechanicville. As N&W has stated, D&H would become a 'bridge line to nowhere' without B&M. As a neutral road, B&M has historically found it possible to work in close cooperation with New York Central on East-West traffic. If B&M were a member or ally of Penn-Central, B&M would obviously work together with that system for their joint benefit. EL, D&H and N&W would all suffer directly as the result of B&M's non-inclusion." B&M Brief, S.D.N.Y. 67 Civ. 2451, September 5, 1967, pp. 42-43.

system would be consistent with the public interest rested on its findings with respect to "normal" earnings. The district court, on the contrary, treated those findings as relevant only to the determination of the financial terms for inclusion. As a result, the district court disposed of the issues raised with respect to those findings on grounds which, whatever their merit in determining the fairness of the price N&W is required to pay, do not sustain the Commission's ultimate conclusion that inclusion is consistent with the public interest. The district court's affirmance of that ultimate conclusion thus rests on grounds not adopted by the Commission.

In dealing with the Commission's failure to make findings to support inclusion of EL alone, or EL and D&H without B&M, the district court compounded its error in refusing to set aside the Commission's order by attempting to justify its action on the basis of evidence which the Commission refused to consider.

Thus, the district court relied upon EL's evidence that "if E-L alone merged with N&W, its losses to Penn-Central would be $8.5 million" (App. B, p. 60). The Commission, however, found that "mergers were nowhere in sight" (330 I.C.C. at 801), and further found that "EL's losses as a subsidiary of N&W would be considerably higher" than $8.5 million (330 I.C.C. at 837). EL's own testimony in this record was that EL, as an independent railroad, would lose $44 million (Tr. 408), and EL's position was stated by its financial expert as follows (EL Stmt. 12, p. 42):

> "We have noted [EL's Traffic Vice President] . . . Schmidt's testimony covering the additional traffic

> which can be realized by N&W and EL as a result of their consolidation as well as the potential effect on EL and on N&W, as separate carriers, if the proposed Penn-Central merger should be approved. . . . *Witness Schmidt concludes that inclusion of EL as a subsidiary of N&W would not significantly offset that impact on either road.*" (Emphasis added.)

This was the record made by EL, the railroad with the data in its possession, and this record was accepted by N&W. The district court improperly undertook to reappraise this evidence, and criticized it on grounds not relied upon by the Commission in its report in this case (App. B, p. 60).

With respect to D&H, the district court went further and found (App. B, p. 61):

> "Even if that same figure [$1.3 million] be used [in determining the added losses to Penn-Central] for D&H as part of an N&W-E-L-D&H system, the impact [of Penn-Central] on net income would be offset by the $565,000 in control savings—itself a low estimate even if N&W does not merge with D&H as it apparently could—which were not credited to D&H on the cash option that N&W requested and will almost certainly exercise."

To reach this conclusion, the district court not only attempted to supply an administrative finding relating to D&H's Penn-Central losses as part of an N&W-EL-D&H system that the Commission itself did not make or even consider, but did so on grounds which the Commission rejected when it (1) found the amount of the control savings (330 I.C.C. at 819), (2) found that "mergers were nowhere in sight" (330 I.C.C. at 801) and (3)

found that D&H is *not* entitled to credit for operating savings in computing a cash price (330 I.C.C. at 818; 331 I.C.C. at 29, 30; see App. B, p. 36, n. 19). The district court thus disagreed with the Commission three times in one sentence in its effort to patch a fatal hole in the Commission's action. This effort of the district court to supply its own findings of fact on essential issues as to which the Commission failed to make findings is characteristic of its entire opinion.

Analysis of the district court's opinion reveals literally dozens of instances in which that court has undertaken to decide questions which are exclusively committed to the administrative agency, but as to which the Commission itself either made no findings at all or made findings inconsistent with the district court's findings and conclusions.

The district court's method of judicial review raises substantial issues for this Court, *first* because of the great public interest in these transactions, and *second* because the district court's whole approach to the case misconceived the proper function of a court in reviewing administrative action. The proper standard is set forth in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . ."

The district court did not "judge the propriety of [the Commission's] action solely by the grounds invoked by the agency." Instead, the district court conjured up grounds that the Commission did not invoke to take the place of findings that the Commission either did not make at all or that were not supported by evidence.

The district court sought to justify its action by asserting that the *Chenery* rule was limited as follows (App. B, p. 69):

> "In *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 248 (1964), the Court made plain that *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), so heavily relied on by N&W, was intended only to establish the important point that a reviewing court could not affirm an agency on a principle the agency might not embrace . . . ."

This interpretation is wholly unsound. The *Massachusetts Trustees* case held only that *Chenery* was inapposite where the agency had merely failed to cite the pertinent section of a statute which admittedly authorized the action taken. *Massachusetts Trustees* did not authorize a reviewing court to supply findings not made by the Commission in an effort to sustain the Commission's order. Any such idea was dispelled by this Court's later decision in *Labor Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444 (1965):

> "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for

> it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' *Securities & Exchange Comm'n* v. *Chenery Corp., supra*, at 196."

The opinion of the district court is a most extreme example of a reviewing court propelling itself into the administrative domain,[14] and the judgment below should be reversed on this ground alone.

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[14] The district court conceded as much in stating that "our discussion has revealed many ways by which, in our view, the Commission could support terms as favorable as it has established even if the Court should have held some of its subsidiary findings to be insufficient" (App. B, p. 69).

Conclusion

For the foregoing reasons, probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE DELAWARE AND HUDSON RAILROAD CORPORATION, *Plaintiff*,	
BOSTON AND MAINE CORPORATION, *Intervening Plaintiff*,	
v.	67 CIV. 2451
UNITED STATES OF AMERICA, *Defendant*,	
INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*	

Memorandum on Motions to Set Schedule and to Join N&W.

The United States of America and the Interstate Commerce Commission have moved this Court to establish an expedited briefing schedule in this action; appended to their motion is a copy of the Amended Pre-Trial Order of the District Court for the Western District of Virginia in Norfolk and Western Railway Co. v. United States of America, Civil Action No. 67-C-51-R. We note the statement of the two judges signing this order that it appeared to them "that the issues raised in this action should be litigated in the United States District Court for the Southern District of New York," and the continuance of the Virginia action for a hearing by the full court including that issue on September 26, 1967. We note also that in directing the continuance the court

made clear that this "shall not be construed to prevent or delay consideration by the United States District Court for the Southern District of New York of all the issues raised in this action" and provided that "any party may file copies of the brief which it has filed on the same issues in the Southern District of New York in lieu of filing original briefs in this action."

In light of the evident belief of the two judges in the Western District of Virginia that we should go forward with this action and of the Supreme Court's mandate for expedited hearing and early determination, we think it is incumbent on us to set a schedule that will permit our deciding this action as soon as feasible. To that end it is

ORDERED that the parties observe the following schedule, which is identical with that established by the District Court for the Western District of Virginia:

(a) Plaintiff and intervening plaintiffs are directed to file any supplemental complaints on or before August 7, 1967, or 7 days following service of the order of the Commission on Petitions for Reconsideration, in Finance Docket No. 21510, *Norfolk and Western Railway Co. and New York Chicago and St. Louis Railroad Co.—Merger, etc.*, whichever date is later.

(b) Defendant and intervening defendants are directed to file their answers, together with such additional pleadings as may be deemed proper, on or before August 14, 1967, or 14 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later.

(c) Plaintiff and intervening plaintiffs may file responsive pleadings if they deem it advisable on or before August 21, 1967, or 21 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later.

(d) No additional motions or pleadings may be filed thereafter except by leave of court for good cause shown.

(e) Proposed exhibits, if any, must be filed with the Clerk of the court on or before August 21, 1967, or 21 days following the service of the order of the Commission on Petitions for Reconsideration, whichever date is later. Formal proof of exhibits will be waived unless objected to in writing on or before September 11, 1967, or 42 days following service of the order of the Commission on Petitions for Reconsideration, whichever is later.

(f) The brief of plaintiff and intervening plaintiffs should be filed on or before August 18, 1967, or 18 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later. The brief of defendant and intervening defendants should be filed on or before September 8, 1967, or 39 days following the service of the order of the Commission on Petitions for Reconsideration, whichever is later. Reply briefs, if any, should be filed on or before September 19, 1967, or 50 days following the service of the order of the Commission on Petitions for Reconsideration, whichever date is later. In the event the hearing is set at an earlier date, reply briefs should be filed on or before the hearing date.

The United States and the Commission have also moved for an order under F.R. Civ. P. 19(a) to join the Norfolk & Western as a plaintiff. We see no reason to doubt that such joinder comes within the words and the evident purpose of the greatly broadened provisions of the first sentence of amended Rule 19(a). We are not persuaded that the last sentence of the rule creates an obstacle; joinder of the N&W as an additional party plaintiff would not "render the venue of the action improper." Here venue rests on the act of the D&H in bringing this action and the defendants' waiver of venue objection; joinder of an additional plaintiff does not defeat venue under 28 U.S.C. § 1398.[1] The motion is therefore granted on condition that such joinder shall not prejudice any contention the N&W may wish to make in any court that the Western District of Virginia is the appropriate forum for review of the inclusion order. Since, in addition to challenging the inclusion order, the Norfolk & Western will doubtless oppose the claims made by the Delaware & Hudson and the Boston & Maine, it may file an additional brief on that issue on or before the date fixed for the filing of briefs by defendants.

The D&H and the B&M also occupy a dual position, as plaintiffs attacking the adequacy of the consideration afforded by the Commission and as defendants answering the N&W's position that the consideration is excessive. Accordingly they also may file an additional brief as defendants answering any such arguments. If Erie-

[1]The final sentence of the rule seems to have been framed in the light of the then venue provisions as to diversity actions, 28 U.S.C. § 1391(a).

Lackawanna should seek intervention as a defendant, its application will be granted and it may file a brief as such.

On the assumption that the Interstate Commerce Commission will rule on the petitions for reconsideration by mid-August, the action is tentatively set for final hearing, see F.R. Civ. P. 65(a)(2), on September 28, 1967, at 10 A.M.

HENRY J. FRIENDLY
U.S.C.J.

RICHARD H. LEVET
U.S.D.J.

EDWARD WEINFELD
Senior U.S.D.J.

July 26, 1967

United States District Court

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

THE DELAWARE AND HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON, BOROUGH OF FREEDOM, and BOSTON AND MAINE R.R. CO.,

Intervening Plaintiffs,

PENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,

Intervening Defendants.

66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, and NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

WESTERN MARYLAND RAILWAY COMPANY,

Intervening Plaintiff.

66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Intervening Plaintiff,

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,

Intervening Defendants.

(Parties continued on inside cover)

OPINION

67 Civ. 2451

THE DELAWARE AND HUDSON RAILROAD CORPORATION and NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant,

BOSTON AND MAINE CORPORATION, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AID ASSOCIATION FOR LUTHERANS, and WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Intervening Plaintiffs,

INTERSTATE COMMERCE COMMISSION and ERIE-LACKAWANNA RAILROAD COMPANY,

Intervening Defendants.

Heard September 18 and 28, 1967 before
FRIENDLY, *Circuit Judge* and
WEINFELD and LEVET, *District Judges.*

CRAVATH, SWAINE & MOORE, by Thomas D. Barr, and ALEXANDER & GREEN, *for Erie-Lackawanna R.R.*

NIXON, MUDGE, ROSE, GUTHRIE, ALEXANDER & MITCHELL, by Harry G. Silleck, Jr., *for Delaware & Hudson R.R.*

SIDLEY & AUSTIN, by Howard J. Trienens and George Saunders, KELLEY, DRYE, NEWHALL, MAGINNES & WARREN, by Frank B. Heiss, WILMER, CUTLER & PICKERING, and WHEELER & WHEELER, *for Norfolk & Western Ry., Baltimore & Ohio R.R., Chesapeake & Ohio Ry. and Western Maryland Ry.*

MACKLIN, HANAN & McKERNAN, by Timothy A. Hanan, and William P. Quinn, *for Reading Company.*

HOGAN & HARTSON, by Edward A. McDermott and James A. Belson, and Richard C. Casey, *for Boston & Maine R.R.*

WINDSOR F. COUSINS, and CONBOY, HEWITT, O'BRIEN & BOARDMAN, by Edward F. Butler, Hubert L. Brinsmade and David J. Mountain, Jr., *for Pennsylvania R.R.*

JAMES B. GRAY and JEROME H. SHAPIRO, *for New York Central R.R.*

SULLIVAN & WORCESTER, by Joseph Auerbach, and James Wm. Moore and Robert M. Peet, *for Richard Joyce Smith and William J. Kirk.*

WILLIAM G. MAHONEY, and REILLY, CURRY & GIBBONS, by Paul G. Reilly, Jr., *for Railway Labor Executives Association.*

DONOVAN, LEISURE, NEWTON & IRVINE, by Malcolm Fooshee and Granville Whittlesey, Jr., *for John Hancock Mutual Life Ins. Co., Prudential Ins. Co. of Amer., Aid Ass'n for Lutherans, and Woodmen of the World Life Ins. Soc.*

MYRON S. ISAACS, *for Oscar Gruss & Son.*

MIGDAL, LOW, TENNEY & GLASS, by Lester G. Migdal and Lawrence W. Pollack, *for New Haven First Mortgage Bondholders' Committee.*

ROBERT W. GINNANE, LEONARD S. GOODMAN, BETTY JO CHRISTIAN and FRITZ R. KAHN, *for Interstate Commerce Commission.*

HOWARD E. SHAPIRO, JOEL A. FORKOSCH and MICHAEL D. HESS, *for United States of America.*

ARTHUR A. ARSHAM and GORDON P. MacDOUGALL, *for City of Scranton and Milton J. Shapp.*

WALTER J. MYSKOWSKI, *for State of New York.*

ROBERT M. SCHACHT, *for State of Rhode Island.*

LEON S. WOLK, *for State of New Jersey.*

SAMUEL KANELL, *for State of Connecticut.*

EDWARD J. HANLEY, *for Commonwealth of Massachusetts.*

JOHN R. THOMPSON, *for City of New York.*

ALAN J. LITTAU, *for Port of New York Authority.*

United States District Court

SOUTHERN DISTRICT OF NEW YORK

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66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

THE DELAWARE AND HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON and BOROUGH OF FREEDOM, and BOSTON AND MAINE R.R. CO.,

Intervening Plaintiffs,

PENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,

Intervening Defendants.

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

WESTERN MARYLAND RAILWAY COMPANY,

Defendant,

Intervening Plaintiff.

---

66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Intervening Plaintiff,

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor,

Intervening Defendants.

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67 Civ. 2451

THE DELAWARE AND HUDSON RAILROAD CORPORATION, and NORFOLK AND WESTERN RAILWAY COMPANY,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

BOSTON AND MAINE CORPORATION, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AID ASSOCIATION FOR LUTHERANS, and WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Intervening Plaintiffs,

INTERSTATE COMMERCE COMMISSION, ERIE-LACKAWANNA RAILROAD COMPANY,

Intervening Defendants.

Heard September 18 and 28, 1967 before
FRIENDLY, *Circuit Judge* and
WEINFELD and LEVET, *District Judges.*

OPINION

FRIENDLY, *Circuit Judge:*

We have before us, on final hearing, actions to enjoin the enforcement of orders of the Interstate Commerce Commission in F. D. 21989 and 21990, see 327 I. C. C. 475, 328 I. C. C. 304, and 330 I. C. C. 328, authorizing the merger of Pennsylvania Railroad Company (PRR) and New York Central Railroad Company (NYC) into a single company (Penn-Central), and in F. D. 21510, see 330 I. C. C. 780 and 331 I. C. C. 22, directing the Norfolk & Western Railway System (N & W) to include Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D & H) and the Boston & Maine Corporation (B & M) on terms therein specified. The orders come before us as a result of three separate actions or sets of them. The first set, sometimes hereafter referred to as the merger actions, consists of three suits, 66 Civ. 2860, 2903 and 2914, attacking the orders in F. D. 21989 and 21990.[1]

1 The first of these was brought by E-L, D & H, and B & M. Chicago and Eastern Illinois R.R. Co., Milton J. Shapp, the City of Scranton,

A year ago we denied temporary injunctions in these suits, Judge Weinfeld dissenting on the ground that the Commission had not finalized the "Appendix G conditions" for the protection of E-L, D & H and B & M, 259 F. Supp. 964 (S. D. N. Y. 1966), and were subsequently reversed by a closely divided Supreme Court, 386 U. S. 372 (1967). In a supplemental report, served June 12, 1967, the Commission revised and completed the Appendix G conditions; on September 11, 1967, the Commission denied petitions for further reconsideration but on August 3 and September 12 it modified its order with respect to the New York, New Haven & Hartford Railroad Company (NH) in certain respects discussed below. The second action, sometimes hereafter referred to as the New Haven action, 66 Civ. 3413, addressed to orders in the same docket, was brought by Oscar Gruss & Son, a large holder of the New Haven's First and Refunding Mortgage Bonds, and a committee representing other holders of such bonds intervened. We dismissed the complaint, as well as a separate action by the committee, 66 Civ. 3425, primarily for lack of standing, 261 F. Supp. 386 (S. D. N. Y. 1966), but the Supreme Court vacated our order on Gruss' appeal, 386 U. S. 776 (1967), and remanded for further consideration. The third action, 67 Civ. 2451, sometimes hereafter referred to as the inclusion action, was brought by D & H to review the order in F. D. 21510 as this affected it;[2] B & M and four

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the City of Jersey City, and the Borough of Freedom intervened as plaintiffs. The second was brought by The Baltimore & Ohio R.R. Co. (B & O), The Chesapeake & Ohio R.R. Co. (C & O), and the N & W. The third was brought by the Central Railroad of New Jersey (CNJ) and The Reading Company; Western Maryland Railway intervened as a plaintiff.

2 By orders dated August 10 and September 1, 1967, the Commission modified its order to meet objections of the D & H; in the former it also denied petitions for reconsideration by B & M and N & W.

life insurance companies holding large amounts of E-L's bonds intervened as plaintiffs and, on motion of the United States and the Interstate Commerce Commission, we directed that N & W be joined as a plaintiff. E-L intervened as a defendant and all four roads affected by the inclusion order are thus parties. Because of the close relation among all three actions, we think it best to dispose of them in a single opinion despite the length which the number of issues necessarily entails.

We shall not here detail the procedural history whereby the threat that these related orders would become the subject of litigation in six or more different district courts has seemingly been averted and all issues concentrated in a single court of first instance. This can be found in our orders of July 3 and July 26, 1967, the orders of the District Court for the Middle District of Pennsylvania dated July 11 and 27, 1967, and the orders of the District Court for the Western District of Virginia dated July 14 and September 11, 1967. Suffice it to say at this point that in our view the proceedings reflect credit on the sober second thought of most counsel and, even more so, on the restraint of the "disciplined and experienced judges," see *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 184 (1952), of the Third and Fourth Circuits, who have demonstrated that even the long out-moded machinery for review of orders of the Interstate Commerce Commission by suit before a three-judge district court can be made to work, although with creaks and strains that ought to be eliminated.

We have said "seemingly averted" because N & W continues to challenge the power of this court to entertain the inclusion action or at least to join it as a plaintiff. Relying on a passage in our order granting the motion for joinder,

wherein we said that this "shall not prejudice any contention the N & W may wish to make in any court that the Western District of Virginia is the appropriate forum for review of the inclusion order," N & W seeks to reargue the venue issue we there decided against it. Mere reading of the passage shows that it was not intended to give N & W permission to reargue after the normal time for seeking this had passed; we wished only to make clear that the joinder of N & W in the action in this district relating to the inclusion order should not preclude argument that, assuming that either this court or the Virginia court could lawfully proceed, the ends of justice would be better served by having the inclusion order reviewed by the latter. N & W now scarcely argues that point, whose lack of merit this opinion will make abundantly clear, and the orders of the Virginia court indicate its agreement that the merger and inclusion actions are so intertwined that they should be initially reviewed by the same court. Nevertheless, because of the importance of avoiding any procedural defect in these proceedings, we have reconsidered N & W's arguments.

We may accept *arguendo*, without however deciding, that, as N & W urges, D & H does not have its "residence or principal office" here within the meaning of 28 U. S. C. §1398(a) since its complaint fixes its principal place of business in Albany in the Northern District of New York, although it is a New York corporation and does business in the Southern District.[3] Concededly none of the intervening plaintiffs has its residence or principal office here. Nevertheless, since 28 U. S. C. §1398(a) goes to venue and not to jurisdiction,

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3 While it has been generally held that a corporation "resides" only in the district of the chartering state where its principal office is located, *Galveston, H. & S. A. Ry.* v. *Gonzales*, 151 U. S. 496 (1894); *Wood* v. *Delaware & H. R.R.*, 63 F. 2d 235 (2 Cir. 1933), it is arguable that a different result should follow under 28 U. S. C. §1398(a) which

joinder is authorized by the first sentence of amended Rule 19(a). Whereas former Rule 19(b) permitted compulsory joinder only of parties "subject to the jurisdiction of the court as to both service of process and venue," the new Rule 19(a) allows joinder of "a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action" subject to his entitlement to dismissal when his joinder "would render the venue of the action improper." The amendment, which has been characterized as "a restructuring of major proportions," see 2 Barron & Holtzoff, Federal Practice & Procedure §511 (1966 pocket part), could hardly have a more suitable application than when one party (N & W) claims an order of the Interstate Commerce Commission to be too favorable to all the others, one of the latter contends it is not sufficiently so, and still others say it is just right. There remains the contention based on the last sentence of the Rule.[4] The letter of this does not cover N & W. If venue were ever improper, it was because D & H has its principal office in Albany rather than in New York City, and that defect, if it were one, see fn. 3, was waived by the United States. Adding N & W as a party plaintiff did not make the alleged defect more serious—*its* joinder did not "render the venue of the action improper" within the language of the Rule.

We see no reason for expanding on the letter under the circumstances of this case. The last sentence of Rule 19(a) seems to have been framed in the light of the then require-

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permits it to sue either in the district of its residence or in that of its principal office since the usual construction would make the alternative illusory in the common case where the principal office is in the incorporating state. However, we find it unnecessary to pass upon this.

4 "If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

ment that in diversity actions all plaintiffs or all defendants reside in the district, and the requirement that in all other cases, save as otherwise provided, all defendants so reside, 28 U. S. C. §§1391(a) and (b). Evidently it was thought anomalous and perhaps contrary to the will of Congress as expressed in those sections that compulsory joinder should lie when the party joined could not initially have joined as a plaintiff or been joined as a defendant without provoking a valid venue objection. But there is nothing anomalous or contrary to the intent of 28 U. S. C. §1398(a) in joining N & W in the instant case. N & W's presence as an additional plaintiff does not give rise to a new venue objection as it would under a provision like that in 28 U. S. C. §1391(a) requiring that *all* plaintiffs reside in the district. Indeed the typical action by railroads to enjoin important orders of the Interstate Commerce Commission includes plaintiffs residing or having their principal office in many states, as witness the plethora of multi-plaintiff actions bearing the names of the Abilene & Southern, the Akron, Canton & Youngstown and the Ann Arbor.[5] Both the present statute and its predecessor, 38 Stat. 219-20 (1913), recognized that in such matters the presence of one plaintiff for whom venue was proper suffices for all and process may then be served throughout the United States, 28 U. S. C. §2321. If one railroad has chosen to sue in a venue to which objection could have been taken but the United States as sole named defendant does not object, no policy is served by allowing another railroad complaining of the order to do so. See *Hoiness* v. *United States*, 335 U. S. 297 (1948). This court having been seized of the action, it is immaterial that, as a result of the Com-

5 It is worth noting that neither N & W nor its allies in the action brought by them to enjoin the merger order, 66 Civ. 2903, resided or had their principal office in the Southern District of New York.

mission's decisions on reconsideration, 331 I. C. C. 22, D & H no longer complains of the inclusion order; the action continues for disposition of the complaints of the intervening plaintiffs and of N & W.

I. The Merger Actions

The only parties who have ever challenged in this court the Commission's basic finding that the Penn-Central merger is in the public interest were intervening plaintiffs Milton J. Shapp, the City of Scranton and the Borough of Freedom. After the Commission had entered its supplemental order served June 12, 1967, the Borough of Moosic brought an action in the District Court for the Middle District of Pennsylvania to enjoin the merger. Shapp and the City of Scranton intervened therein and the City of Pottsville applied for intervention; we are advised that the Borough of Moosic was represented by the same attorneys who appeared here for Shapp and the City of Scranton and that the complaint was substantially the same as that heretofore presented in this court. On July 11, the District Court for the Middle District of Pennsylvania stayed proceedings before it until October 1. Shapp and the City of Scranton moved to stay proceedings on their intervening complaints here or, in the alternative, to permit their dismissal without prejudice. In our order of July 26, 1967, we denied these motions but extended the time fixed for these intervenors to file a supplemental complaint; we also stated that we would permit the Borough of Moosic and the City of Pottsville to intervene. They did not accept the invitation, and Shapp and the City of Scranton failed to file supplemental complaints or further briefs as directed by our orders. The United States and the Interstate Commerce Commission have moved pursuant to F. R. Civ. P. 41(b) that we dismiss the complaints of Shapp and the City

of Scranton with prejudice for want of prosecution; PRR and NYC join in the motion. For reasons indicated in our previous orders we are wholly unpersuaded by the intervenors' contentions that their applications here were of limited scope and they should now be free to withdraw and challenge the merger orders in another court of their own choosing. Their case therefore falls within the ordinary rule that the claim of a litigant who refuses to file an amended or supplemental complaint or to comply with other lawful procedural orders of the court will be dismissed with prejudice. We therefore grant the motion for such dismissal.[6]

Chicago & Eastern Illinois Railroad Company has moved for dismissal of its intervening complaint with prejudice and we have granted that motion. We have also granted the unopposed motion of PRR and NYC for dismissal with prejudice of the intervening complaints of the parties listed in the margin[7] who have failed to file supplemental complaints or briefs as directed by our order of July 3.

The posture of the actions has changed in several other respects. The Trustees of CNJ, which has invoked §77 of the Bankruptcy Act since the case was previously here,

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6 While we entertain no doubt of the sufficiency of this ground, we think it well to add that, apart from any question as to standing, we find no merit in the complaints of Shapp and The City of Scranton. Much of their objection was directed against the portion of the order permitting E-L, D & H and B & M to petition in certain eventualities for inclusion in Penn-Central, but these roads could not be included in Penn-Central except on a finding that such inclusion was in the public interest and this would be subject to judicial review. The criticism that the Commission did not give adequate weight to the improved earnings of PRR and NYC during the course of the merger proceedings has been shattered by the results for the first half of 1967. Beyond this the attacks simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission.

7 City of Hoboken; City of Union City; Township of North Bergen; Town of West New York; Township of Weehawken; City of Jersey City; Borough of Freedom.

sought and were granted dispensation from the schedule for supplemental complaints, briefs and argument on their stipulation that, while reserving the right to assert that the order of the Commission should contain protective conditions for the benefit of CNJ, "they will not assert in any Court any claim that the Penn-Central merger should be delayed for any reason" or that the Appendix G conditions in favor of other carriers should be set aside. B & M has changed its position from opposition to support of immediate consummation of the Penn-Central merger. Finally, E-L and D & H now make no objection to the revised Appendix G conditions; they seek a further injunction only because the Commission failed to reserve jurisdiction to require Penn-Central to pay a capital loss indemnity and because it has authorized immediate consummation of the merger without completion of judicial review.

The Appendix G Conditions.

While the three protected roads make no objection to the Appendix G traffic and current indemnity conditions, these continue to be the object of sharp criticism from N & W and the three roads, C & O, B & O and Western Maryland, making common cause with it. The specific claims are that the revenue indemnity conditions create a pooling agreement in defiance of §5(1) of the Interstate Commerce Act; that they will unwarrantably injure the unprotected roads; and that there is no substantial evidence of the merger's being in the public interest so long as the Appendix G conditions remain in effect. We find these contentions without merit.

Section 5(1) makes it unlawful for any common carrier subject to chapters 1, 8 and 12 of the Interstate Commerce Act to "enter into any contract, agreement, or combination

'among carriers' for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof" unless the Commission finds that such pooling or division "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition." In its report on reconsideration of September 16, 1966, the Commission held that the Appendix G conditions were not within §5(1) since they did not constitute a contract, agreement or combination entered into by the carriers involved and, less forcefully, that in any event §5(2)(b) authorized it to approve a merger on such terms and conditions as it found "just and reasonable" even if these would otherwise violate some other prohibition of the Act, 328 I. C. C. at 326.[8] In a footnote to its supplemental report the Commission reiterated the former position but added that even if the revenue indemnification "constituted pooling within the meaning of section 5(1), this record clearly supports findings as required by that subsection, i.e., that to protect these carriers clearly is in the interest of better service to the public" and "will not unduly restrain competition." 330 I. C. C. at 345 n. 8.

We agree that financial indemnification to weaker railroads prescribed by a governmental agency as a condition to approval of a merger is not within the fair intendment

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8 While we find it unnecessary to pass upon this ground, the authority cited in the Commission's brief, *Atlantic Coast Line R.R.* v. *United States*, 284 U. S. 288 (1932), is inapposite. The Court there held that §5(2) permitted the Commission to condition its approval of a lease on the lessee's agreement to establish a through route that would short-haul itself although §15(4) would have prevented the Commission from compelling this absent an application under §5. There is a rather obvious distinction between a limitation on the power of the Commission such as §15(4) and a declaration of illegality such as §5(1). See *Chicago & N. W. Ry.* v. *Peoria & Pekin Ry.*, 319 F. 2d 117, 122 (7 Cir. 1963), in which the Court of Appeals held that approval of a pooling agreement under §5(2) in an earlier proceeding did not satisfy the requirements of §5(1).

of §5(1) even though indemnification becomes effective only by the indemnitor's accepting the provisions as a condition to consummating the merger. While the construction urged by plaintiffs would, to say the least, be pressing language to its utmost bounds, we need not decide whether this reading would fall within or without the limit to which the words can be pushed. "This is not the way to read such legislation. It is true also of Acts of Congress that 'The letter killeth.'" *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 548 (1950) (dissenting opinion of Mr. Justice Frankfurter). Section 5(1) of the Interstate Commerce Act has been with us for a long time. Its lineage goes back to the original Act of 1887, §5 of which made it unlawful for any common carrier subject to the Act "to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of such railroads, or any portion thereof . . . ," 24 Stat. 380, and the evil at which it is aimed remains the same. "The mischief and defect for which the common law did not provide," Heydon's Case, 3 Co. 72 (1584), consisted in truly consensual arrangements between carriers giving each an incentive to raise rates to the highest point and reduce service to the lowest point the traffic would bear. The framers of §5 were acting against cartels; their words cannot fairly be used to invalidate a provision developed by the Commission, which then had no power to do so, to compel a stronger road to pay a portion of its revenues to weaker ones in order to enable the latter better to compete.[9]

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9 Alternatively we see no reason why footnote 8 to the supplemental report, 330 I. C. C. at 345, does not meet the requirement of §5(1). The footnote is not to be considered alone, as N & W and its allies propose, but along with the extensive discussion of the Appendix G

The contention that the financial indemnity will injure N & W and other unprotected carriers rests on the theory, described in our previous opinion, 259 F. Supp. at 970, that the indemnity formula gives the protected carriers an abnormal incentive to throw interline traffic to Penn-Central rather than to the unprotected lines in order to increase the "standard revenue" of the protected carriers for a future year, and Penn-Central an abnormal incentive to throw such traffic to the protected carriers rather than to others in order to increase the formers' "earned revenue." After taking much evidence and engaging in extensive discussion, 330 I. C. C. at 353-56, the Commission found the contention unproved. While the studies submitted by the unprotected roads showed considerable amounts of traffic susceptible to diversion of the sort indicated, the Commission found that neither the protected roads nor Penn-Central would have either the motive or the ability to engage in such diversion on any substantial scale. The Commission nevertheless included in its findings "a provision that would prohibit the protected carriers from engaging in manipulation, with sanctions if they do" and reserved jurisdiction to reopen the proceedings in the event of such manipulation and modify Appendix G accordingly, 330 I. C. C. at 355.

Forecasting the future ability and desire of railroads to effect diversion is peculiarly a matter for the expert judgment of the "tribunal appointed by law and informed by experience." *Illinois Central R.R.* v. *I. C. C.*, 206 U. S. 441,

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conditions in all three reports. When these are read in their entirety, they amply support findings that the financial indemnity provisions "will be in the interest of better service to the public" by preserving the viability of the three protected roads and that, in view of their limited and temporary character, the Commission's power to revise them, and the other considerations outlined in the Supplemental Report, 330 I. C. C. at 351-52, they will not "unduly restrain competition."

454 (1907). Almost all N & W's contentions on this subject simply reflect disagreement with conclusions which the evidence warranted the Commission in reaching and are thus beyond our power to review. There is only one possible exception. While the Commission found that the protected roads had no power to divert traffic in the interim covered by Appendix G, it held in the *Inclusion* case that the roads could divert traffic to N & W after their inclusion. N & W claims that the two findings contradict one another. The claim is readily answered. Once integrated into N & W, the protected roads will be able to offer shippers more efficient service. Under present conditions, however, shippers will gain little or nothing by permitting the protected roads to divert their traffic to Penn-Central. The position of these three lines as a permanent part of a strong N & W system will be altogether different from their present status. Moreover we see no reason to doubt the efficacy of the Commission's reservation of jurisdiction to take action against manipulation.[10]

We are similarly unpersuaded by N & W's contention that the Commission did not find, or in any event had no evidentiary basis for finding, that consummation of the merger under the Appendix G conditions would be in the public interest. Such a finding is implicit in the very con-

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10 N & W and its allies contend they will be precluded from obtaining judicial review of denial of any complaints they may make on the score of manipulation, since paragraph 5A of Appendix G provides that "All controversies arising under the appendix shall be determined with finality by the Interstate Commerce Commission," whose orders thereunder "shall not be reviewable in any court." The Commission says this is limited to controversies as to the application of Appendix G between Penn-Central and the three protected lines and not to action taken or refused under the reservation of jurisdiction on the score of manipulation. This is surely a permissible reading—indeed in our view the natural one. In any event we accept the Commission's statement as a binding representation to that effect. Cf. *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 241 (1936).

cept of devising conditions permitting consummation prior to actual inclusion of the protected roads in a major system and was made explicit when the Commission said that only "some of the merger benefits" would be prevented and that the conditions would not work "an undue hardship upon applicants either in their operations or merger implementation." 327 I. C. C. at 532; see also 330 I. C. C. at 361. To deny evidentiary basis for this finding would defy common sense. An end to the uncertainty that has plagued the applicant roads for five and a half years would be enough. Nothing in Appendix G prevents the realignment of management, the elimination of many duplications in personnel, the undertaking of financing, or the refurbishing and, in many cases, the implementation of plans for better and more economical service. The Appendix G conditions impose no restrictions on activities concerning routes not competitive with the three protected lines; there are enough of these to absorb the energies of Penn-Central's management for some time. Beyond all these considerations early consummation of the merger not only will benefit the New Haven but is necessary to its survival. For, as will appear later, that road's condition has become far graver than when this case was last before us or the Supreme Court.

Capital Loss Indemnity.

E-L, D & H, and N & W and its allies complain of the Commission's refusal, 330 I. C. C. at 359-60, to prescribe "capital loss indemnification" for any decrease in the price payable to the protected roads due to diversion of traffic to Penn-Central, whether before or after inclusion in a larger system, or even to reserve jurisdiction to do so. The Commission justified this on the basis that under its decision in the *Inclusion* case there would be no such decrease, 330

I. C. C. at 360. While E-L and D & H endorse that conclusion, they nevertheless claim that the failure to reserve jurisdiction on the capital loss issue was error. They fear that if N & W's objections to the inclusion provisions should be sustained either here or ultimately by the Supreme Court, it may be impossible for the Commission to devise equitable terms for their inclusion in N & W without Penn-Central paying a capital indemnity. Since E-L and D & H assert they cannot fairly be asked to accept a reduction in the sales price as a result of losses inflicted by the merged Penn-Central and N & W says it cannot be asked to pay more than the roads are worth in light of the Penn-Central merger, Penn-Central, it is contended, must be required to pay for the loss it has caused the protected roads and the Commission should have reserved jurisdiction to that end so that the legality of such a position could be determined before the merger was consummated.

So far as the fears of E-L and D & H relate to action by this court, they are mooted by our decision in the *Inclusion* case. For reasons stated in section IV of this opinion we doubt that any decision of the Supreme Court will demand downward revision of the terms. Moreover, we are not at all sure, for reasons developed in our discussion of the *Inclusion* case, that the Court or the Commission on a remand would subscribe to the view that N & W can only be required to pay a sum which takes account of post-Penn-Central-merger losses, or—for that matter—would accept the view of E-L and D & H that the Interstate Commerce Act requires them to be compensated for any decrease in price resulting from such losses. On the other hand we have little doubt that if PRR and NYC elect to consummate the merger before a final disposition by the

Supreme Court, they take their chances as to any further conditions with respect to capital loss indemnity that the Court might direct the Commission to impose. While we would not have disapproved the reservation of jurisdiction which E-L and D & H advocate, we shall not direct the Commission to amend its order as they request.

N & W claims that a capital indemnity is needed even if, as it disputes, the Commission's finding that post-inclusion losses do not require a lower price should be affirmed. It says that while the Appendix G conditions may make the three roads substantially whole for traffic diverted to Penn-Central during the protected period, traffic once diverted to so powerful a competitor is not readily regained. The roads will therefore be worth less to N & W at the time of inclusion than if inclusion could be effected simultaneously with Penn-Central consummation, and Penn-Central must be required to pay the difference. Apart from our unwillingness to commit ourselves to the legal premise on which this argument necessarily rests, N & W's fears are factually unsupported.

There is no support for N & W's contention that despite the highly restrictive Appendix G traffic conditions, which, as we said a year ago, "go far beyond anything in previous history," 259 F. Supp. at 976-77 and see n. 10, Penn-Central will be able to divert a significant amount of traffic during the interim period. The figure of $16,300,000 in revenues, which the Commission estimated Penn-Central might divert from these roads after their inclusion in N & W, when it is no longer shackled by Appendix G, obviously is totally unrelated to what it can divert under the Appendix G traffic conditions. Indeed the contention is in sharp contrast to N & W's claim, discussed above, that these conditions

so restrict Penn-Central as to strip the merger of all public interest so long as they exist. There is also the impressive testimony, recounted in our previous opinion, 259 F. Supp. at 977-78, that even apart from the protective conditions, some time would elapse before diversionary effects on the protected roads would occur. This is of particular importance if, as now seems likely, the protected period will be short.

We also find no force in N & W's final argument that the order in the merger case was defective because it did not affirmatively find that the only proper home for the three roads is in N & W or N & W-C & O-B & O and not in Penn-Central, but provided instead that the roads might seek inclusion in Penn-Central in certain contingencies. While the Commission's decision in the *Inclusion* case made clear where it thought the proper home to be, 330 I. C. C. at 796, we see no reason why it was bound absolutely to exclude Penn-Central as an alternative, particularly in light of the then existing possibility that refusal of the stockholders of E-L to accept the inclusion terms would prevent inclusion of D & H or B & M in N & W, and the still existing although unlikely one that refusal by D & H's stockholders would prevent inclusion of B & M. N & W is fully protected by its right to oppose inclusion of any of the three roads in Penn-Central.

Complaint of the Reading.

The merger case presents only one more issue that requires discussion, other than that relating to the authorization of immediate consummation which we reserve for the final section of this opinion. Reading complains that it was not allowed to show the injuries it would suffer from the Penn-Central merger as such. It claims that these

would be so extensive as to entitle it to protective conditions similar to those provided in Appendix G for E-L, D & H and B & M, and seeks a remand to that end.

Reading has long been regarded as a "family line" of the B & O, affording along with CNJ that system's access to the metropolitan New York area. Some 38% of its stock is owned by B & O and another 10% is held by Otis & Co. subject to a first refusal by C & O. Five of its eleven directors are B & O nominees, and three other "public" directors were on the management slate. Several of its officers are former B & O employees whose salary continues to be paid by B & O to maintain their pension rights (although B & O is reimbursed by Reading) or hold office jointly in the two roads.

Reading intervened before the Commission in the merger proceeding in August 1962. In April 1963 it advised the Commission that it would not oppose the merger if the Commission would impose standard routing and gateway conditions and PRR was required to divest its holdings in N & W. It introduced no evidence of possible diversion. However, in response to an inquiry from the Commonwealth of Pennsylvania which was conducting an investigation of the effect of the merger on railroads serving the state, the President of the Reading wrote a letter that was subsequently received in evidence. This stated that in 1961 Reading handled a total of 1,116,000 carloads; that 122,000 carloads were interchanged with NYC at Newberry Junction and another 10,000 cars were handled with NYC via an intermediate carrier; that the Reading thought it "possible that as much as 25% of the shipments thus interchanged would be diverted";[11] and that the study did not

11 This constitutes 3% of Reading's total carloads. Counsel advised us that Reading would lose $2,700,000 in revenue if its prediction is realized, assuming that the cars diverted yielded average revenues.

include traffic interchanged with PRR since "the Pennsylvania would now be handling it if this were physically feasible." The Examiners found that "the net effect [of the merger] will not be detrimental" to Reading or to its "ability to provide a general transportation service to the public" and the Commission adopted these findings in its initial report, 327 I. C. C. at 481-82.

After the Commission had issued its Report, Reading sought reconsideration arguing that the finding was inconsistent with another statement of the Examiners that in view of the paucity of evidence they had "no way of assessing the overall implications of the proposed merger" upon Reading; it requested a further hearing to show the adverse effect of the merger in general and also of the Appendix G conditions. The Commission reworded its finding to read that "it has not been shown of record" that the merger would be detrimental to Reading or its "ability to provide a general transportation service to the public," and gave Reading leave to participate in the further hearing as to the effect of the Appendix G conditions, but denied the request to reopen the record to show general adverse effect of the merger. At the further hearing, the Examiners received a Reading exhibit seeking to prove that $3,500,000 of annual revenue would be subject to diversion because of "manipulation" of the Appendix G conditions; but the Commission rejected the conclusion for reasons we have earlier sustained. The Examiners excluded another exhibit purporting to show that up to $19,900,000 of revenue was subject to diversion as a result of the Penn-Central transaction as such. The Commission affirmed this ruling, holding the Reading to be bound by its "original concession that the effect of the merger transaction (without the indemnity conditions) . . . would be inconsequential." 330 I. C. C. at 357.

We cannot fault the Commission for this ruling. Administrative proceedings, especially of such complexity as this, would never end if parties remained free to take new positions at any time and seek to support them with evidence that had been available all along. See *United States* v. *Northern Pac. Ry.*, 288 U. S. 490, 494 (1933); *Valley Telecasting Co.* v. *F. C. C.*, 336 F. 2d 914, 917 (D. C. Cir. 1964). Reading's reliance on *Udall* v. *F. P. C.*, 387 U. S. 428 (1967), is misplaced; there the Secretary of the Interior had taken his position from the time the administrative proceeding commenced and submitted his studies as soon as these could be completed. Furthermore, the Secretary of the Interior is an especially important representative of the public—when he speaks others should try to hear him, especially when he speaks on behalf of fish, who have few other spokesmen. While Reading's assertion that the Commission is more than an umpire has its validity, this does not support the conclusion that the Commission is not warranted in taking a railroad at its word or is obliged to reopen a proceeding whenever management has a second thought. *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19, 28 (E. D. Mich.), aff'd, 375 U. S. 216 (1963). Moreover, management's initial conclusion that the effect of the merger would be inconsequential was supported by its own letter to the Commonwealth of Pennsylvania which was in evidence and the new evidence sought to be offered was scarcely persuasive.[12] If

12 This included, in addition to the interchange with NYC, all traffic, whether interline or local, originating or terminating at a place served both by PRR and by Reading. The study did not attempt to estimate how much of the $19,900,000 of allegedly divertible traffic would in fact be diverted. It admitted, though, that the traffic most likely to be diverted was the traffic exchanged with NYC at Newberry Junction —the same traffic that Reading's President discussed in his 1962 letter to the Commonwealth of Pennsylvania.

Reading's management thought it could safely remain silent since it would be taken care of by its parents although neglecting the opportunity to bind them afforded by the C & O-B & O acquisition, 317 I. C. C. 261 (1962),[13] the Commission was also warranted in thinking so. Indeed it is still exceedingly hard to believe that B & O will see the roads affording it access to the metropolitan New York area disappear, although it naturally will do everything possible to exploit its lack of obligation to include Reading and CNJ in its own system both to minimize their commuter burden and to forward the N & W-C & O-B & O merger. If Reading's independent stockholders should ultimately be damaged by action or inaction of management dictated by B & O to further its own interest at the cost of Reading's, they are not without remedy.

II. The New Haven Action

In an opinion reported in 261 F. Supp. 386 (S. D. N. Y. 1966), we dismissed, primarily for lack of standing, the complaints of Oscar Gruss & Son, 66 Civ. 3413, and The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders' Committee, 66 Civ. 3425, to enjoin consummation of the Penn-Central merger until the properties of NH were included therein. Gruss appealed to the Supreme Court but the Committee did not. After reversing our denial of a temporary injunction of the merger in the suits brought by other railroads to that end, *Baltimore & Ohio R.R.* v. *United States*, 386 U. S. 372 (1967), the Supreme Court entered an order on Gruss' appeal providing in relevant part as follows:

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13 Reading has finally sought a commitment for interim aid by a petition for reconsideration in Chesapeake & Ohio Ry. Co.—Control—Western Maryland Ry. Co., 328 I. C. C. 684 (1967), which is still pending.

"Since the order which appellant's suit attacked is now subject to further consideration by the Commission and since proceedings to achieve inclusion of the New Haven are also under way before the Commission, it appears inappropriate to review the decision of the District Court at this time. Rather, we vacate the order of the District Court and remand the case to that court. Should appellant still be dissatisfied with the ultimate order of the Commission in the merger proceedings, it may attempt a fresh challenge in the District Court." 386 U. S. 776, 777 (1967).

After the Commission had rendered its Supplemental Report of June 12, 1967, we gave leave for the filing of supplemental complaints in the Gruss action; these repeated the prayers of the original complaint that consummation of the Penn-Central merger be enjoined pending inclusion of NH. The United States, the Interstate Commerce Commission, the Trustees of NH and PRR and NYC move for dismissal both for lack of standing[14] and on the merits.

While some progress has been made in the direction of inclusion of NH in Penn-Central by sale of its assets, the day of such inclusion is at best some time off. Commission hearings in the inclusion proceeding under §5(2) of the Interstate Commerce Act have been concluded and the case stands submitted but no report has yet been rendered. As a result of adverse intimations by the Court of Appeals for this Circuit in *Chase Manhattan Bank* v. *Smith,* 378 F. 2d 635, 638-40 (1967), the NH Trustees have abandoned their proposal to attempt to effect inclusion as a first step in a two-step plan of reorganization under §77 of the Bank-

14 They contend further that the Committee, which had also intervened as a plaintiff in the Gruss action, is barred by virtue of its failure to appeal from our previous judgment of dismissal.

ruptcy Act and have proposed a full plan, including provisions for distribution among creditors, which will require approval by the Commission and the reorganization court, submission to creditors, and either approval by them or a determination by the court to utilize the "cram-down" provisions of §77(e), before inclusion can occur. Beyond all these sources of uncertainty and delay is the possibility, adverted to by the Court of Appeals, 378 F. 2d at 639, that lack of action by NH stockholders, who have long since ceased to have any economic interest in the property, might nevertheless prevent inclusion unless the Supreme Court should follow the dissenting views of Mr. Justice Douglas and two other Justices rather than those of the four-man majority in *St. Joe Paper Co.* v. *Atlantic Coast Line*, 347 U. S. 298 (1954), or Congress should adopt corrective legislation.

Meanwhile it has become unhappily evident that events will not await the resolution of these issues. Although the NH Trustees had stopped the attrition of cash in 1963 and again, as a result of some $6,000,000 in aid from the states served by NH, in 1966, the loss of cash resumed disastrously in the early months of 1967 and has continued. In an opinion dated July 11, 1967, Judge Anderson found that NH's depletion of cash was "so serious, that if the present rate of loss continues, there will be insufficient left by late September to meet the payroll of approximately $1,400,000 per week," that if the Penn-Central merger "does not become effective shortly after September, the New Haven will be faced with a desperately critical situation," and that "it cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system." Recognizing the impropriety of the Trustees' taking any action that would be or appear to be

a repudiation of the contract which they made with PRR and NYC in good faith, he directed that they "should not oppose the immediate inclusion request by other parties in interest," noted the offer of the Trustee for the First Mortgage Bonds to present the matter to the Commission in its brief in the NH Inclusion Case, and stated his opinion "that it is very much in the interests of the Debtor's estate that this issue be so submitted." Such a suggestion was made not only by the Trustee under the First and Refunding Mortgage but by the trustees under two other mortgages, Gruss, the Committee, and the states of New York, Connecticut, Rhode Island and Massachusetts.

The Commission reacted with speed. By order served August 3, 1967, it directed the NH Trustees to negotiate a lease of NH with PRR and NYC to be "immediately available upon consummation of the Penn-Central merger"; the order also stated "that it would be inequitable during the lease period to place the entire burden of the NH operating deficit upon Penn-Central, and that consideration should be given to devising terms which would equitably distribute such burden." The agreement or proposals therefor were to be submitted within 30 days, and consummation of the merger would constitute irrevocable assent to a lease prescribed by the Commission subject to judicial review of any decision as to the effect of operations thereunder on the inclusion terms. On September 1 the NH Trustees on the one hand and PRR-NYC on the other reported that it would be impossible to prepare a lease and have this made effective in time to meet NH's desperate needs; they submitted as an alternative proposal that immediately upon consummation Penn-Central would commit itself to purchase up to $25,000,000 of Trustees' Certificates over a period of three years. The proposal of PRR and NYC was that certificates

so purchased could be tendered as part of the purchase price of NH; the Trustees' proposal was that upon the closing of the purchase Penn-Central should pay an amount equal to NH's Adjusted Net Deficit for the period subsequent to consummation of the merger.[15] By order served September 12, 1967, the Commission took note of these submissions, directed a hearing on September 25, 1967, to enable it to determine "(1) whether a lease agreement, a loan arrangement, or other alternatives afford the most suitable means of assuring the continuation of the NH's operations until the NH assets can be transferred to the ownership of Penn-Central, and (2) equitable terms for the arrangement adopted," dispensed with an examiner's report, and broadened the condition clause of its August 3 order so that consummation of the merger would constitute an irrevocable assent of Penn-Central "to lease the NH or enter into a loan or other appropriate arrangement with the NH for continuation of the NH's operations under such just, reasonable and equitable terms as the Commission may require," subject again to judicial review.

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15 Adjusted Net Deficit is any red figure resulting from the following adjustment of NH's net railway operating income: Income would be increased by adding NH's income under the Grand Central Terminal Agreements to the extent recognized by NYC, and any deficiency in public assistance below current levels. Expenses would be decreased by deducting depreciation charged to railway operating income (other than depreciation which §9.14 of the Purchase Agreement requires to be deducted from the purchase price) but would be increased by adding fixed charges for rent for leased roads and funded and unfunded debt not in default. The submission of the NH Trustees reports that the deficit in net railway operating income does not take account of unpaid operating costs, aggregating some $5,000,000 in 1966, representing deferred real estate taxes, per diem in controversy, and unpaid tort claim obligations. Under its proposal these would be a charge against creditors. The Trustees' Certificates held by Penn-Central would be offset against the amount of Penn-Central bonds otherwise required to be issued on the closing.

The parties are in sharp disagreement whether the Supreme Court disapproved our holding on the plaintiffs' lack of standing. There is little profit in an extended attempt at exegesis; the extracts from the briefs before the Court which have been submitted to us add nothing to the words of the short opinion. Our inclination is to take the Court's statement, "it appears inappropriate to review the decision of the District Court at this time," as meaning what it says. The Court seems to us to have deferred decision on a difficult question of standing which it thought might become academic in view of the remand to the Commission directed in the *Baltimore & Ohio* suit or of the New Haven inclusion proceeding; if this proved not to be so, it wished us to reconsider the question in the light of subsequent developments. While we entertain no doubt as to the correctness of our decision of last fall as the case then stood, we recognized that matters would appear differently if the reorganization court found that the NH Trustees, even though acting in the best of faith, had disabled themselves from properly representing the estate on a certain issue, 261 F. Supp. at 394. Judge Anderson's order of July 11, 1967, did something along these lines; we think it plain that the Trustee under the First and Refunding Mortgage would have had standing if the Commission had taken no heed of its lease proposal. Although it can be argued that the court's order went no further than that, we take a broader view—particularly in view of the explanation by the Trustee under the First Mortgage Bonds at the argument before us that its failure to institute legal action was due to its belief that the plaintiffs were effectively representing the bondholders.[16] Similarly, what we

16 We find no force in the argument that the standard "no-action" clause in the First and Refunding Mortgage Indenture bars action by a bondholder or a bondholders' committee. The clause applies only to

previously said with respect to untimeliness, 261 F. Supp. at 394-95, is to some extent inapplicable in light of the changed economic position of the NH and the proceedings we have just recited.

Insofar as the complaints seek to enjoin consummation of the merger pending inclusion of the properties of NH by way of sale, they are sufficiently answered by Judge Anderson's order of July 11. In his view any substantial postponement of consummation means speedy death for the New Haven; hope lies rather in early consummation subject to a commitment that will fairly assure continued operation while the administrative and judicial mills continue their painfully slow grind. In its order of August 3, 1967, the Commission reiterated its conclusion that contentions "that there are possible solutions to the NH problem other than inclusion in Penn-Central are without merit," and at the argument before us Gruss' counsel conceded that the only alternative to inclusion in Penn-Central is liquidation. While the Committee holds out the possibility of condemnation by the four states served by NH, wishful thinking will not meet imminent payrolls.

Indeed, the plaintiffs now appear to recognize that injunction of consummation pending purchase would mean a cessation of operations by NH, and would be satisfied to have us permit consummation if this were conditioned on a lease wherein Penn-Central would shoulder all operating losses, whether or not caused by the merger, until NH either was included or ceased to run. Penn-Central is understandably unwilling voluntarily to go so far, although under the Commission's order of September 12 the com-

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suits "for the foreclosure of this Indenture, or for the execution of a receiver, or for any other remedy hereunder . . . ." Moreover, even if the clause were applicable, the Trustee appears to have waived it.

panies by consummating the merger take the risk, subject only to the safeguard of judicial review, that they may be compelled to do just that. *Per contra,* if the Commission's order should prove unsatisfactory to the plaintiffs, they too will be entitled to seek review. What is urgent to avoid cessation of NH's vital service are (1) early consummation of the Penn-Central merger and (2) a Commission order prescribing some form of financial aid that will permit the NH's operations to continue beyond December 31, 1967, when, as the NH Trustees now advise, their cash available for operations will be exhausted. The Commission has given every indication of its intention to do precisely that. To be sure we are confronted, as we were a year ago, with a condition that is not in all respects complete, although far more nearly so than the Appendix G conditions as they then stood. But with the situation now so serious, there can hardly be doubt that it is better to accept what is good for the New Haven than permit the patient to die while in quest of the best.

The remaining point is the Committee's contention that at the very least NH should have the benefit of Appendix G conditions. In our previous opinion we outlined why the Commission could well have considered these to be unnecessary or inappropriate, 261 F. Supp. at 389-91. The unlikelihood that Penn-Central would avail itself of its opportunities for diversion from NH in the interval prior to inclusion would be heightened if it is now required to bear or share in operating losses. Moreover, we are told that the issue of financial indemnity conditions is under advisement by the Commission in the NH Inclusion case; the Commission thus has power to include such conditions and plaintiffs can seek review if it does not. While such conditions would become effective only in the event of NH's

ultimate inclusion and in practical terms would thus simply produce an addition to the purchase price, it is likely, if not indeed certain, that only in the event of inclusion will there be a New Haven operation; we find nothing in the Interstate Commerce Act that would compel the Commission to require an operating railroad such as Penn-Central to reimburse creditors of a defunct one for losses due to merger diversion. Particularly in view of the failure to raise the issue of protective conditions at an earlier date, see 261 F. Supp. at 391 n. 3 and 394-95, we decline to direct the Commission to modify the order authorizing the merger so as to include them.

We therefore dismiss the complaint without prejudice to any relief plaintiffs may be advised to seek as a result of the Commission's decision in the proceeding initiated by its orders of August 3 and September 12, 1967, or of its order in the NH Inclusion case.

III. The N & W Inclusion Action

No substantial attack is made on the Commission's basic finding, as set forth under the headings "Public Interest," 330 I. C. C. at 784-89, "Advantages to N & W," 330 I. C. C. at 792-93, "Advantages to petitioners and to the public," 330 I. C. C. at 794-95, and "Competitive effects," 330 I. C. C. at 795-96, that inclusion of E-L, D & H and B & M in the N & W system on proper terms is in the public interest. No carrier not a party to the inclusion contends in this court that it will be adversely affected or requires additional conditions for its protection. Only two points come even close to the larger public interest in the transaction, and little discussion is needed to show their lack of merit. *First,* N & W complains that the Commission should have considered the desirability of including the three roads

along with Reading and CNJ as wholly owned subsidiaries in a larger N & W-B & O-C & O System (the so-called DERECO plan). The Commission was justified in refusing to do this. Such a course would have frustrated the expeditious decision in the instant case envisioned by the Supreme Court, 386 U. S. at 392, since hearings on the N & W-B & O-C & O proposal were still in progress. On the other hand, nothing here decided by the Commission would block subsequent consideration of the larger proposal. *Second,* N & W would have us fault the Commission for failing to find that inclusion of any of the three roads in Penn-Central would not be in the public interest. The Commission did find "that inclusion of the petitioners in the N & W system is preferable to their inclusion in the Penn-Central." 330 I. C. C. at 796. That was the most that was required; apart from what we have said concerning a similar contention in the merger actions, the negative determination sought by N & W was not within the issues of the *Inclusion* case.

With respect to the terms N & W alleges numerous errors in favor of the included lines, while B & M claims the price fixed for it is too low. Insurance companies holding some $30 million of E-L bonds contend that the order will permit dilution of the security for their mortgages and impair or prevent the payment of interest particularly on income bonds. On the other hand, E-L and D & H are now satisfied with the terms, which E-L's stockholders have already accepted and D & H's board of directors has unanimously voted to recommend.

We note at the outset that the scope of our review of an order prescribing such terms is limited. This court has said that "Because of the broad authority conferred upon the Commission by §5 of the Interstate Commerce Act and the technical complexities of a merger case, the doctrine of

administrative finality is particularly applicable." *Friedman* v. *United States,* 168 F. Supp. 815, 818 (1958). Relevant also is this court's statement in *Stott* v. *United States,* 166 F. Supp. 851, 857 (1958), that on such matters we are not permitted to substitute our own judgment for that of the agency, or consider the expediency or wisdom of its decision, or whether on like testimony we would have made a similar ruling.

Employee Protective Conditions.

N & W's objections to the employee protective conditions, 330 I. C. C. at 822-26, fall as soon as this limitation on our power is recognized. The Commission noted that in the earlier phase of this proceeding N & W had entered into agreements with many labor unions providing that job elimination resulting from absorption of the Nickel Plate, the Wabash and other carriers would be accomplished only through normal attrition; these agreements were later modified to prohibit the transfer of employees beyond their general locality. For other employees the Commission had then prescribed conditions in line with its general practice, 324 I. C. C. at 50. Here the Commission prescribed the same conditions—either N & W's existing contracts were to be modified to take in employees of the included roads or similar new agreements were to be written; if no agreement was concluded within 60 days, the Commission would prescribe appropriate conditions.

The Commission acted within its powers in requiring N & W to protect employees of the three roads as thoroughly as those of the roads it was permitted to absorb only on the condition that it would accept these lines if the Commission so directed. It is no matter that as late as *Erie R. Co. Merger,* 312 I. C. C. 185, 196 (1960), sustained in *Bhd of Maintenance of Way Employees* v. *United States,*

366 U. S. 169 (1961), and *Atchison, T. & S. F. Ry. Co. Merger,* 324 I. C. C. 254, 261 (1965), the Commission had rejected attrition conditions upon finding they would merely "preserve unneeded jobs." If the Commission believes more liberal protection against the effects of inclusion is appropriate either in general or, as here, on the facts of a particular case, that is a policy matter which Congress left for it to decide. Moreover the record strongly indicates that the attrition condition will not significantly affect the savings contemplated from the inclusion of the three roads simply as wholly owned subsidiaries, 333 I. C. C. at 823-24. While there is more merit to N & W's contention that the protection should not extend to job reductions from causes other than inclusion, the Commission's decision that employees of the three roads should be treated in the same way N & W had agreed to treat its present employees has a sufficient basis in reason that we cannot properly upset it; and although N & W is correct that the figures at 330 I. C. C. 824 do not include job eliminations from other causes, it presented no evidence as to what these would be or that they would constitute a serious burden. Finally we reject N & W's objection to the imposition of a "job freeze" during the 60-day period allowed for working out an agreement or, failing that, a Commission decision, which should be speedily forthcoming. N & W would scarcely be making extensive work reassignments in this brief interval, and we see no basis for its fears that the freeze would continue during possible litigation over a Commission decision allowing work reassignments.

The Commission's General Standard and Method of Valuation and N & W's Criticisms.

As this is the first case in which the Commission has fixed an equitable purchase price under §5(2)(d), it prop-

erly sought to elucidate the standard that should govern its action. It held it was "not required to find that N & W benefits affirmatively and financially under the terms of inclusion," that N & W would have no legitimate complaint if the terms "will have a neutral effect on the N & W stockholders, neither diverting any funds from such stockholders to petitioners' stockholders nor in any other way diluting the present holdings of the N & W stockholders," and that "the inclusion of petitioners on terms fully recognizing their benefit to the N & W system is also equitable to petitioners since it attributes to them earnings not obtainable by them as independents." 330 I. C. C. at 801-02.

N & W's claim that benefits of the inclusion must be equally divided between each included road and itself forgets the purpose of §5(2)(d) and the wide latitude accorded the Commission in carrying it out. This section, enacted as part of the Transportation Act of 1940, 54 Stat. 906, is but the latest in a series of enactments going back to the "recapture" clause of Transportation Act, 1920, 41 Stat. 489-91, whereby Congress has attempted in one way or another to require stronger railroads to help carry some weaker ones. Recognizing that voluntary consolidation would include only the more desirable candidates and would leave the weaker brethren to languish, Congress authorized the Commission to condition permission to consolidate on the inclusion of undesired lines. This authority was not limited to railroads that were harmed by the merger; Congress gave the Commission a power it could utilize to establish a sound railroad structure. The Commission was thus entirely justified in holding there was no basis for complaint by the acquiring road so long as the forced inclusion did not diminish the benefits of the consolidation to which it was attached as a condition. Indeed, although we find it unnecessary so to decide,

it may well be that, as the Commission intimated, 330 I. C. C. at 802, it could lawfully invade the benefits of the prior consolidation on a showing that inclusion was required by the public interest and that allocating some of such benefits to the owners of the additional roads was the only way of meeting their reasonable expectations, perhaps based on possible inclusion in another system that would be less in the public interest.[17] While N & W cites decisions where the Commission has divided benefits in approving the fairness of consensual arrangements,[18] the Commission did not say in these cases that a basis more favorable to the weaker road would be inequitable. Apart from the limited scope of *stare decisis* to administrative determination of policy issues, see *Pinellas Broadcasting Co.* v. *FCC,* 230 F. 2d 204, 206 (D. C. Cir.), cert. denied, 350 U. S. 1007 (1956), these decisions did not bind the Commission to follow a similar practice when fixing equitable terms for involuntary acquisitions under §5(2)(d) and, in accepting the "Appendix O" conditions to its merger, 324 I. C. C. at 148, N & W had no sufficient basis for assuming that they did.

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17 If the line promoting the consolidation did not wish to go through with it under such a condition, it could of course refuse. Compare *Atlantic Coast Line R.R.* v. *United States,* 284 U. S. 288 (1932). No different result would be demanded because, as here, a carrier had elected to consummate an acquisition and begun to enjoy its benefits subject to the Commission later fixing equitable terms for the inclusion of other carriers.

18 This was the situation in *Louisville & N. R. Co. Merger,* 295 I. C. C. 457, 497 (1957); *Norfolk & Western-Merger-Virginian,* 307 I. C. C. 401, 430 (1959); and *Seaboard Air Line R. Co.-Merger-Atlantic Coast Line,* 320 I. C. C. 122, 157, 192 (1963). In *Florida East Coast R. Co. Reorganization,* 282 I. C. C. 81 (1951), also cited in N & W's brief, the Commission, before approving a reorganization plan submitted by the Atlantic Coast Line for a merger with the debtor, insisted that the debtor be credited with half the prospective merger savings, 282 I. C. C. at 159-60.

Having thus established the ground rules, the Commission next had to determine the corporate method by which inclusion of the three roads should be effected. Although merger would maximize both economies and traffic gains, the Commission found merger would be unfair to N & W in the cases of E-L and B & M because of their heavy debt and, in the latter instance, large early maturities. While there were no similar obstacles to a merger of D & H, N & W objected to acquiring that company's excess working capital and D & H took the position, which the Commission accepted, that if it had to retain this, it was entitled to sell its operating assets on a taxable basis that would produce an immediate refund of some $4,500,000 and large credits against the income D & H expects to realize from retention of the excess working capital.

Under the plan prescribed by the Commission E-L and B & M are to convey their assets, subject to existing indebtedness, to new subsidiaries all of whose common shares will be owned by another subsidiary, NC, whose common stock will be owned by N & W; the shareholders of the two companies would then receive preferred stock of NC convertible into N & W common on a share for share basis at the end of five years or sooner if Congress should enact legislation (the Keogh bill) which would give N & W the benefit of these carriers' loss carry-forwards. D & H is also to sell its assets other than excess working capital, subject to existing indebtedness, to a N & W subsidiary which is to pay in cash[19] or, at its option, in a note and N & W stock as

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19 N & W objects that the Commission did not also fix cash prices for E-L and B & M. N & W did not raise the issue until its exceptions to the report of Commissioner Webb as hearing examiner. The Commission was not bound to fix such a price, especially if, as it thought, 330 I. C. C. at 818, 331 I. C. C. at 29, 30, savings and traffic gains resulting from inclusion should not be considered on that alternative, see fn. 22.

explained below. This plan of incorporating the three companies as subsidiaries necessarily results in underestimating the benefits of inclusion if N & W's resourceful management should ultimately find it possible to work out arrangements with bondholders that would permit merger and thereby obtain freedom to deal with the personnel and properties of N & W and the included roads as a single entity.

The process followed by the Commission in setting the price was broadly this: It first established for each of the three roads a normalized year's income unaffected either by inclusion in N & W or by the Penn-Central merger. It then added the benefits the road would obtain from inclusion in N & W both by saving expenses and by gains from existing traffic rerouted by some element of the future N & W-E-L-D & H-B & M system so as to produce the longest system haul.[20] Next the Commission sought to satisfy itself that any traffic losses the three roads would suffer to Penn-Central would be offset by other benefits to N & W not already taken into account. It then established for E-L and

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20 These gains were estimated as follows, 330 I. C. C. at 804, 834:

Line		Gain in gross revenues through N & W's efforts (1)	Gain in gross revenues through all carriers' efforts (2)
1	N & W	——	$ 4.62
2	E-L	$ 2.8	4.33
3	D & H	1.4	2.13
4	B & M	1.6	1.72
		$ 5.8	$12.80

The figure in Line 1, column (2), was not utilized in adjusting the income of the three roads. N & W contends that the figures in column (1) are excessive by $1.16 million. The argument concerns the extent to which the results of N & W's rerouting efforts would approach petitioners'. Commissioner Webb gave N & W's contention sufficient weight when he credited it with only $5.8 million gain, derived from witness Wyer's survey (E-L Exhibit 99), rather than the full $7.0 million which was the sum of line 7, columns 1-3, 330 I. C. C. at 834, as had been claimed.

B & M a ratio between the adjusted net income per share of the included road for the period utilized and that of N & W for the year ending June 30, 1966, the latter being adjusted upward for yet unrealized net savings from N & W's previous merger. Finally it established exchange ratios for these roads which took account not only of these earnings ratios but of all other relevant factors. Thus, while the earnings ratio for E-L was .172 to 1, the Commission set a lower exchange ratio of .128 to 1 which E-L's financial consultant had regarded as fair and equitable.[21] For B & M the earnings ratios were .126 per common share and .220 per preferred share; the Commission reduced these to exchange ratios of .10 and .175. In fixing a cash price for the sale of all assets of D & H except excess working capital, the Commission capitalized at 8.3% the adjusted income available for fixed charges other than income on the excess working capital, inclusion savings and traffic gains; from this it deducted the long term debt and a $4,500,000 tax refund expected to be immediately received by D & H and arrived at a cash price of $41,211,000.[22]

N & W attacks almost every step in this process. To begin with, it objects to the Commission's using as a base for computation the D & H and B & M earnings for 1965

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21 The downward adjustment takes account of the lower "quality" of E-L's earnings, where, on 1965 figures, only 6¢ per dollar of railway operating revenues were available for fixed charges as against 26¢ for N & W, 330 I. C. C. at 808, making E-L more vulnerable to decreased revenues or increased expenses.

22 N & W was given an option to make the purchase with a $1,000,000 five year 6% note plus 412,627 shares of N & W stock valued at the current market value of $105 per share, or a total of $44,325,855. The cash price for D & H is $3 million lower than the stock price, because, in reaching the cash price, D & H's earnings were adjusted to eliminate control savings and traffic gains, to which the Commission felt the D & H stockholders would not be entitled in a cash transaction since they would not bear the risks of the new enterprise.

adjusted, in a manner proposed by petitioners' witness Wyer and revised by N & W's witness Brinner, to eliminate nonrecurring items and reflect on a full year basis operational changes effective for only part of 1965 (the so-called "Wyer-Brinner adjustments"). N & W says that since 1966 results are now available—and are lower than the adjusted figures—the Commission was bound to use them, especially since it used an average of 1965-66 earnings as a base for E-L and earnings for the year ended June 30, 1966 as a base for N & W. It also calls attention to the decline in E-L earnings during 1967.

As the hearing before Commissioner Webb began on April 20 and ended on August 10, 1966, results for 1966 were not available; indeed when the hearing began, the latest figures that had been available to Wyer were for the 12 months ended October 31, 1965, and Brinner's revisions were designed to take account of the full year 1965 rather than the earlier 12 months Wyer had used. The hearing examiner and the Commission having properly used 1965 figures, they were not required to start anew when the 1966 figures for D & H and B & M became a part of the record as a result of stipulation of the carriers' Form A reports. These are simply raw figures which have not been analyzed to remove extraordinary items or to place others on a full year basis; by the time the experts could do that and the Commission could render a new report, 1967 figures would be available and, on N & W's argument, the process must start again. The law does not compel an infinite regress. Indeed, N & W's present insistence on the importance of the newest data contrasts sharply with the position it took before the Commission as to the appropriate base period for valuing E-L. When Commissioner Webb used the most recent data then available—the reported income available for fixed charges for the year end-

ing June 30, 1966—to reflect E-L's continuing efficiency program, N & W objected and, on its exception, the Commission used a lower figure representing the adjusted average for 1965 and 1966. And the Commission's use of N & W's adjusted income for the year ended June 30, 1966 rather than the lower figure for 1965, compare 330 I. C. C. 816 and 881, is surely not something of which N & W can fairly complain. While the Commission was at liberty to consider the more recent figures, it was not bound to do so.

N & W argues further that if 1965 figures were to be used, they should not have been adjusted as Wyer proposed since his adjustments "reflect only the ordinary operational changes which are constantly occurring on any railroad and as to which *no* adjustment need be made." This same argument was made before the Commission, and the agency, in the exercise of its expert judgment, rejected it. N & W has not analyzed Wyer's calculations in detail to show that the Commission's decision was arbitrary. Its only specific grievance goes to the Commission's failure to consider the significance of the substantial wage increase granted to B & M employees one day after the base period's end. It argues that many of the efficiencies B & M had introduced in 1965 were offset by this increase. But the Commission found that the wage increase did not undermine its conclusions based on the year ending December 31, 1965. It noted "that in the past B & M has demonstrated an ability to offset wage increases by improved efficiency, and conclude[d] that this ability should only be heightened after inclusion in the N & W system." 330 I. C. C. at 820. This seems an adequate answer. Of course, to determine accurately whether the wage increase was offset, one would have to study the further efficiencies

B & M instituted during 1966. But this detailed study, as we have just explained, was not required.

N & W next contends that the adjusted income of E-L and B & M should be adjusted downward for undermaintenance. The subject also is one where deference is owed to the Commission's expertise, and we are content to rest on its discussion, 330 I. C. C. at 809-11 and 858-65, and the related portions of Commissioner Webb's report, which demonstrate substantial evidence to support the Commission's refusal to make the requested adjustment.

In a third argument directed at the pre-inclusion earnings N & W asserts "there is no evidence to support the Commission's finding that E-L will have $7.5 millions of earnings attributable to relief from the commuter burden."[23] The $7.5 million figure is made up of the following items:

	In Millions
1. Exemption of passenger service facilities from property taxation	$0.7
2. Discontinuances already authorized by N. J. Board of Public Utility Commissioners	2.0
3. N. J. property tax reduction	1.3
4. Assistance payments	3.5
	$7.5

Since the first three are already in hand,[24] the argument boils down to the point that when the record closed, no

23 The adjustment appearing in the report is $6.8 million, 330 I. C. C. at 813, which, however, reflects the receipt during the test period of part of the estimated $1.3 million reduction in New Jersey property taxes.

24 N & W argues that there was no substantial evidence supporting the amount of the second item. The savings estimate was made by the

contract for future assistance payments had been signed and that in any event these cannot be counted on since they depend on annual appropriations by the legislature.

Here again N & W is insisting on a degree of certainty beyond the capacity of an expert agency forecasting earnings; the Commission had to make the best estimate of future New Jersey assistance payments that available material permitted. In 1965 E-L received $3.4 million and a witness for the State of New Jersey testified that the new contract then being negotiated would pay about $3.5. N & W does not contend that post-hearing events have belied this estimate. To be sure payments under the new contract are contingent upon annual appropriations by the legislature, but if that kind of uncertainty prevented reasonable prediction, the conduct of business would be impossible. The Commission's estimate was surely more accurate than one that ignored the assistance payments altogether.

Effect of the Penn-Central Merger.

N & W mounts a heavy attack on the Commission's conclusion that "since the petitioners' traffic losses to Penn-Central are fully offset by traffic savings and additions to N & W resulting from inclusion, those traffic losses do not adversely and materially affect petitioners' value and should be disregarded in the computation of exchange prices." 330 I. C. C. at 809.

We begin with some general observations. Commissioner Webb, who had presided at the hearing, refused to reduce petitioners' net income on account of anticipated losses to Penn-Central, in part on what seems to us the wholly reasonable ground of N & W's failure to introduce detailed

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New Jersey Board of Public Utility Commissioners, and the Commission was justified in relying on it.

evidence as to the losses it would suffer, 330 I. C. C. at 802. However, he also declined to credit the three roads with any of the anticipated gains from rerouting of traffic to provide the longest system haul. Rightly believing that the second of the two rulings prejudiced petitioners, the Commission upset both. We fail to understand why the two issues had to stand or fall together. N & W manifestly was not entitled to compare its own earnings unreduced by Penn-Central losses to petitioners' earnings so reduced.

We also do not accept N & W's premise that the Commission was bound to discount petitioners' earnings for traffic losses to Penn-Central. Our position rests not on the broad view sketched above, see text accompanying fn. 17, but on considerations relating to this particular case. If N & W had been required to include petitioners before completing its merger with the Nickel Plate and the Wabash in 1964, the three lines would have been entitled to credit for the traffic gains through rerouting but would hardly have been subjected to a penalty for losses arising from the contingency of a future Penn-Central merger. The Commission permitted consummation of the earlier consolidation without inclusion of E-L partly because the parties asked to be permitted "to resolve the problems between them in due course of time", 324 I. C. C. at 22, in voluntary negotiations. These having failed, N & W should stand no better because it chose to complete its merger, which promised annual savings of $29,000,000, on condition that it would include the lines later if the Commission directed. Moreover, as Commissioner (now Chairman) Tucker pointed out in his dissenting expression in the N & W merger case, 324 I. C. C. at 57-60, and his concurrence in the Penn-Central merger case, 327 I. C. C. at 549, the N & W merger, along with the previous C & O-

B & O unification, 317 I. C. C. 261 (1962), gave strong impetus to a Penn-Central merger. In approving the latter the Commission stressed "that applicants will face increasing competition from those two greatly strengthened rail systems." 327 I. C. C. at 519. We see scant equity in allowing N & W to discount petitioners' earnings for all losses due to an event which it must have recognized as highly likely when it accepted the "Appendix O" conditions and to which its own merger had led in considerable measure.[25] It is no matter that, as N & W urges, its merger did not itself damage petitioners. Neither is it decisive that N & W was controlled by PRR at the time; it sought the merger as a corporation and has derived large benefits from it. If petitioners' losses to Penn-Central are to be taken into account at all, N & W could fairly be asked to bear at least some share—at minimum, for example, the amount of traffic it has already gained by diversion from petitioners or Penn-Central as a result of its merger. We stress this both to avoid future misunderstanding and to indicate that the Commission approached the problem of losses to Penn-Central on a basis considerably more favorable to N & W than we believe was required; we do not, however, rely on it as a ground for our decision.

Finally we emphasize that the figures detailing the estimated losses to Penn-Central which have been so heatedly debated are infected with the "delusive exactness" that Mr.

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25 Evidently Commissioner Webb had something of this sort in mind when he said: "If the inclusion of EL, D & H, and B & M in either the N & W system or the Penn-Central system is practically assured, their inclusion in the system chosen by the Commission in the furtherance of national transportation objectives should not be on terms which reflect any diminution of capital value attributable to the traffic diversion impact of the other system. In other words, the petitioners should not be penalized for anticipating the Commission's desire to preserve rail competition in the territory they serve." Report, p. 28.

Justice Holmes, speaking in a different context, characterized as "a source of fallacy throughout the law." *Truax* v. *Corrigan,* 257 U. S. 312, 342 (1921). The estimate that petitioners, after inclusion in N & W, would lose $16.34 million of freight revenues to Penn-Central[26] rested primarily on an N & W study of their traffic for the twelve months ended July 1965. Thousands of samples were subjected to examination and a judgment made as to the percentage of each that would be diverted. While Commissioner Webb reduced certain items, he accepted the bulk of the study although noting its infirmities, since he had given petitioners the benefit of the doubt on their rerouting studies. It is not apparent to us that the two matters were *in pari materia.* Petitioners' studies, supervised by an independent expert, involved a judgment of how they could reroute traffic they were already handling; N & W did not make a separate study but rather restructured the petitioners' data—which originally was designed to show traffic gains—and made conclusions as to how much petitioners would lose to a different railroad. Yet no matter how often the Commission repeated that such figures were "approximations" or "rough estimates," see 330 I. C. C. at 806, the craving of the human mind for a certainty that is unattainable tends to crystallize them into a sharpness that is not there. As Mr. Justice Cardozo pertinently observed, "An intelligent estimate of probable future values, and even indeed of present ones, is at best an

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26 The figures as adjusted by Commissioner Webb broke down as follows:

	Millions
E-L	$11.37
D & H	3.08
B & M	1.89
	$16.34

330 I. C. C. at 806.

approximation. The like is true of a forecast of future revenues. There is left in every case a reasonable margin of fluctuation and uncertainty." *Dayton Power & Light Co.* v. *Public Utility Comm'n*, 292 U. S. 290, 310 (1934).

N & W conceded that the Penn-Central merger would adversely affect its own traffic and that petitioners' inclusion would have "some effect" in protecting it. However, while it made the detailed study of petitioners' losses we have just described, it made no similar study of its own losses to Penn-Central or of the extent to which petitioners' inclusion would assist it in reducing them. No one else was in a position to do this, especially in view of N & W's failure to furnish even the detailed break-down of its interline revenues for which Commissioner Webb had called at the prehearing conference. Faced with this impasse, the Commission attempted to assess the assistance the three roads would render as best it could.

N & W had estimated that if the three roads were included in Penn-Central, its maximum loss would be $22 million.[27] Since the Commission found that inclusion of the petitioners would strengthen N & W, it concluded that, without petitioners, N & W would have a greater loss to Penn-Central and undertook to "determine how much greater and whether the further loss would be as great as" the $16.3 million which N & W estimated the three roads would lose to Penn-Central, 330 I. C. C. at 807. Simply for purposes of illustration it added the $16.3 million to the $22 million, yielding a total of $38.3 million. It then considered whether, without the three roads, N & W "could lose (or fail to gain) up to a total of $38.3 million of its revenues in competition with Penn-Central

27 This figure was obtained by applying the percentage of N & W's interline revenues with petitioners which N & W had estimated would be diverted, to wit, 5.3%, to N & W's total interline traffic of $413 million.

or 6 percent of N & W's annual gross revenues of $600 million," 330 I. C. C. at 807. The Commission found it reasonable to believe that N & W's losses without petitioners could reach such an amount and that their addition would thus save it as much traffic as they would lose. N & W protests that no evidence in the record supports the conclusion that without petitioners' help it would lose 6% of its revenues. We would agree that, taking account of the location of the two systems and the nature of N & W's historic traffic, the figure seems high, at least in relation to the 5.6% estimated diversion from the petitioners who are more exposed to Penn-Central competition and the 5.3% estimated diversion of N & W's revenues from interline traffic with them, although, as the Commission indicated, N & W's traffic witness declined to testify that the adverse impact of the Penn-Central merger on it would be less than on petitioners, saying rather "I can't state a relative opinion on that question. The three petitioners would be hurt and so would the N & W system." 330 I. C. C. at 805.[28] But if the Commission's minuend of $38.3 million may well be too high, so is the subtrahend since, as the Commission noted, 330 I. C. C. at 807 fn. 15 and 808, the $22 million was a maximum estimate and a high one for the very reason just indicated. The Commission was not compelled to accept N & W's response that petitioners can assist only as to traffic on which they "have a handle," namely, the $36.6 million of N & W traffic in which they participate. Petitioners can help N & W not only with respect to interline traffic they now carry with it but when-

28 The witness first testified that inclusion of petitioners would not protect any N & W freight revenues that would otherwise be lost to Penn-Central. However, he conceded in response to Commissioner Webb's questions that he had not made a detailed estimate of the extent of N & W's losses to Penn-Central and admitted on cross-examination that his discussion had been very incomplete and that petitioners' inclusion would yield "some" service benefits.

ever their inclusion will enable N & W to compete with Penn-Central more effectively. In view of N & W's failure to submit the detailed breakdown of its traffic necessary for a more nearly accurate judgment of the help petitioners could render, the Commission was warranted in proceeding as it did. Similarly, while the methodology of a second and lower estimate of a $9.5 million saving, 330 I. C. C. 805 & fn. 12, was faulty as the Commission recognized, the end result, that inclusion of petitioners might save N & W against Penn-Central diversion some 1.6% of its total freight revenues or 2.3% of its interline freight revenues, is not so clearly unreasonable as to invite judicial condemnation, at least when no better figures were available.

Furthermore the Commission properly did not consider itself obliged to find that the entire $16.34 million of petitioners' estimated losses to Penn-Central would be offset by N & W savings of this one type. It credited the three roads with the $4.62 million in added N & W revenue resulting from petitioners' rerouting traffic to provide the longest system haul, line 1, column (2), in the table reproduced in fn. 20, which had not been allocated to any of the three lines. It also took account of what it thought would be "the greatest single gain for N & W," namely, "its enhanced ability to obtain *new traffic* over and above the rerouting traffic in competition with Penn-Central and other modes of transportation," 330 I. C. C. at 805;[29] E-L's inclusion, for example, would permit N & W to gain "several million" dollars in new revenue by providing single line service to New York City. 330 I. C. C. at 806. N & W is mistaken in asserting that this double-counts the traffic already used to increase petitioners' revenues; the Commission's report is clear that those figures included only traffic N & W or the petitioners "now handle at least in part," 330 I. C. C.

29 This was not limited to $2.2 million as N & W claims.

at 803.[30] Moreover, a buyer in N & W's position would consider not only the extent to which the petitioners could strengthen its competitive position upon inclusion, but also the damage they could do if negotiations were to fail and they were to remain independent or ultimately be allowed to join the Penn-Central system. While the Commission found that the three roads would have no incentive to divert N & W traffic during the protected period because, among other reasons, "they expect to become affiliates of N & W, and could not afford to take traffic from that system" 330 I. C. C. at 355, the situation would be quite different if petitioners were to believe they might become or in fact did become permanent parts of Penn-Central.[31] When all these elements are considered, the Commission's conclusion, 330 I. C. C. at 809, quoted at the outset of this discussion, is plainly rational. What is demanded is substantial evidence to support the agency's ultimate finding, not logical perfection in every step.[32]

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30 The passages from Commissioner Webb's report cited by N & W to support its contention of double-counting did refer to new traffic as one of the several reasons for giving the petitioners' rerouting studies the benefit of the doubt. But he more than offset any advantage that decision afforded the three roads by giving N & W the benefit of the doubt when calculating their losses to Penn-Central. 330 I. C. C. at 836-38.

31 E-L's brief cites in this connection that N & W's study showed N & W revenues of $10.46 million from traffic originated or terminated by petitioners and handled by N & W as an intermediate carrier; in a comparable situation where N & W was an intermediate carrier on traffic originated or terminated by NH, it estimated 48.1% diversion from NH's inclusion in Penn-Central. An additional $13.19 million of the $36.6 million N & W revenues from traffic interchanged with petitioners represent other traffic originated or terminated by petitioners and susceptible to diversion by them.

32 We therefore find it unnecessary to pass upon the validity of another theory developed by the Commission, 330 I. C. C. at 808-09, based on the higher value of traffic gained (or not lost) by N & W than of traffic lost by petitioners. Apart from other criticisms, this theory does appear to

Considerations Relating to Individual Roads, and B & M's Complaint That the Price for It Is Inadequate.

Even if we had reached a different result on the traffic issue just discussed, we would sustain the prices fixed by the Commission on the basis of other factors relating to individual roads.

(1) *Erie-Lackawanna.*

E-L cites many elements of conservatism in the valuation of its property which N & W has not successfully challenged. The Commission's figure of adjusted earnings took account of a potential $2.2 million increase in E-L's New York property taxes that cannot occur before 1971, allowed for $3.3 million in additional contingent interest charges that will not be incurred before 1972, and ignored a $1 million saving in income taxes that E-L will contribute to N & W forthwith. While the earnings comparisons would have supported a ratio of 0.172 shares of N & W for each share of E-L, the Commission first marked this down by some 25% to 0.128. Furthermore, the stock in the new N & W subsidiary that would be issued to E-L shareholders is not convertible into N & W stock for five years, unless the Keogh bill is enacted at an earlier date. In the interim E-L stockholders would almost certainly receive no dividends. N & W's financial expert testified that similiar shares would sell for 15-20% less than the N & W common into which they were ultimately to be convertible. Discounts of this magnitude demonstrate the fallacy of an attack directed at any single item of earnings; we cannot

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be inconsistent with the treatment of petitioners' gains effected through rerouting which were estimated to produce net income of about 41 or 42 cents per dollar of gross, 330 I. C. C. at 815, 817, 821.

emphasize too strongly that the Commission's exchange ratios represented an informed judgment on all elements of value rather than a mere mathematical calculation from some of them. The Commission also correctly noted that "even if EL earnings are not sufficient to support the proposed stock exchange ratios, N & W's investment is protected since E-L's income would be earned subject to five substantial tax benefits," including several not heretofore mentioned. 330 I. C. C. 816 and 846-47. E-L's brief contains computations not challenged by N & W showing that tax savings will insure N & W's recovery of its $55 million investment in E-L within 10 years even if E-L earned nothing.[33] In the light of all this, the Commission was justified in concluding that any overestimate of E-L's earning power was fully compensated, 330 I. C. C. at 816.

(2) *Delaware & Hudson.*

D & H brings forward equally persuasive examples of the Commission's conservatism. On the cash alternative, which is what N & W sought and will almost surely exercise, see fn. 22, D & H receives no credit for the $2.13 million gross revenues it will gain through rerouting. Hence the $3.08 million gross revenues estimated by N & W to be lost to Penn-Central are fully offset by these gains and the $852,000 of N & W revenues on interline traffic with D & H which the Commission found its inclusion would save.[34]

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33 We fail to appreciate the force of N & W's answer, namely, that E-L's financial expert testified his recommended exchange ratio was justified only if E-L had earnings at the level estimated by him. The Commission was not bound to adopt this testimony.

34 N & W's contention that this finding is inconsistent with the Commission's "adoption" of N & W's Penn-Central loss study is unconvincing. The Commission accepted this only as a "rough estimate" which gave N & W the benefit of the doubt.

Furthermore the cash alternative gives D & H no credit for $565,000 a year in control savings. Beyond all this is the indeterminate gain to N & W in obtaining new traffic as a result of D & H's inclusion.

N & W argues against this that the purchase of D & H's assets in a transaction wherein D & H's loss is recognized for tax purposes will result in larger income taxes for New D & H since it will not retain Old D & H's high basis for depreciation and will be unable to continue certain methods of accelerated depreciation. Having rejected a D & H merger proposal that would have preserved these tax benefits and produced substantial added control savings, N & W has no legitimate complaint when in deference to its objection the Commission sanctioned a different form of inclusion giving D & H substantial tax benefits but allocating to N & W $4,500,000 of them—nearly half of what it asserts the capitalized cost of the increased annual income taxes of $768,000 to be. Such action was well within the latitude accorded the Commission.

(3) *Boston & Maine.*

N & W's complaint as to the valuation of B & M stresses that company's long record of net income deficits, the lowest of which was $578,000 in 1965 followed by $1,540,000 in 1966. In light of this it attacks the Commission's black figure of $1,486,000 as irrational. However, this figure reflects the addition of $717,000 to net income as a result of $1,720,000 of traffic gains through rerouting and the deduction from expenses of $328,000 of control savings. The issue thus turns on the propriety of an estimated $441,000 of pre-inclusion income,[35] and this depends in large part

35 Commissioner Webb's estimate of B & M's prospective earnings, which the Commission accepted as a starting point, was $605,000. Since this figure includes $164,000 (50% of the $328,000) in traffic gains, it is only the remaining $441,000 that does not come from either control savings or traffic gains from rerouting.

on the savings anticipated from passenger train discontinuances, a subject within the Commission's expertise. Moreover there is some cushion in its scale-down of the exchange ratio for B & M common stock from .126 to .110 and preferred stock from .220 to .175. There remains only the issue of traffic losses to Penn-Central. As the initiating carrier has the greatest influence on shipper routing decisions, and B & M initiates a considerable portion of its traffic, its estimated loss—$1.89 million—is the lowest of any of the three carriers, not only in absolute but in percentage terms. Its position as an originating carrier should also enhance its ability to protect N & W traffic.

In sharp contrast to N & W's argument, B & M claims it has been undervalued. Although it alleges an underestimate of traffic gains, its more persuasive point concerns control savings. B & M sought inclusion through merger, and submitted studies as to the consequent savings on both a two-way and a four-way basis. However, when it became apparent that merger was not in the cards for any of the three carriers, petitioners' witness Wyer presented testimony on the savings (and traffic gains) resulting from inclusion as controlled subsidiaries. Wyer concluded that the only savings under control would be those resulting from consolidation of the traffic solicitation forces; he thought that savings from the consolidation of administrative forces available under merger would not accrue under control because of difficulties in working out agreements with labor organizations that would permit the transfer of work from one company to another. The Commission adopted his figures. By petition for reconsideration B & M sought an increased valuation relying primarily on testimony by a witness proffered by N & W and C & O-B & O in their merger proceeding, F. D. 23832, that demonstrated an intention to operate E-L, D & H, B & M, CNJ and Reading,

if included as controlled subsidiaries under the DERECO plan, in a manner that would effect economies (and traffic gains) considerably exceeding those estimated by Mr. Wyer. B & M then combined this testimony with Commissioner Webb's view, "There is no reason to believe that EL, D & H, and B & M as wholly owned carrier subsidiaries of a little Dereco would enjoy a greater measure of independence than they would as subsidiaries of a larger Dereco, or that N & W could coordinate the operations of five such subsidiaries but not of three," p. 58. The Commission was unpersuaded, 331 I. C. C. at 38-41.

We cannot fault the Commission for refusing to fix a higher value for B & M stock or for rejecting its request to deny its petition for inclusion if a higher value could not be set and thereby safeguard its right to seek compulsory inclusion in Penn-Central. We must indeed confess surprise that control savings would be as limited as Mr. Wyer estimated; we should have supposed that, notwithstanding the problems arising from labor agreements, it would be possible over the years to effectuate many savings in such categories as top management, purchasing, planning, engineering and accounting. B & M concedes, as it must, that a party cannot normally object if an agency has awarded all that its witness has claimed; if a carrier chooses to present its case on a basis more conservative than the facts would warrant, the Commission can take it at its word. However, it contends for a different result here on two grounds.

Calling attention to the Commission's over-all public interest findings that petitioners will benefit from "unified management" including "joint routes of affiliated lines, the prospect of single line service, elimination of interchanges, improved schedules, and a more flexible distribution of equipment," 330 I. C. C. at 795, B & M says these findings

show that the Commission thought that larger savings could be achieved than witness Wyer had estimated, but nevertheless failed to allow B & M corresponding benefits. We find in this no legal basis for reversal. While the Commission seems indeed to have believed that control savings would exceed those claimed by witness Wyer, it was not bound to attempt to price these out into increased earnings without the aid of detailed evidence and B & M had not furnished this.

B & M's other contention is that the Commission was required to reopen the record because such evidence was furnished by the witness in the N & W-C & O-B & O merger case. We think not. Apart from N & W's contentions that this testimony was based on inclusion of five roads in a larger system rather than of three in a smaller one and that it had been prefigured by earlier testimony long known to B & M, the issue had always been what savings could be effected by inclusion of the three roads as controlled subsidiaries, not what N & W would choose to effect. Commissioner Webb's general statement, largely directed at traffic matters, cannot be taken as a finding that any specific savings beyond Wyer's figures would be achieved. Furthermore, a reopening could hardly be so limited as B & M wished. What we said in section I of this opinion concerning the complaint of the Reading applies equally to B & M. Proceedings of this complexity must sometime come to an end; all that is required is that a party should have had a fair opportunity to prove its case and that the decision be supported by the evidence tendered. On the other hand it is reasonable to consider the conservatism of the estimate of control savings demonstrated by B & M as a further "cushion"—and this comment applies to E-L and D & H as well.

In its other major attack on the price fixed for B & M, N & W argues that it cannot fairly be directed to make any substantial payment for the stock since B & M has $46.5 million of First Mortgage Bonds, whose maturity has recently been extended to July 1, 1970, and other nonequipment obligations of $19.4 million falling due that year. The Commission's answer, "We foresee no danger to the N & W system" and "Whether able to meet all the demands of its capital structure or not, and whether in reorganization or out, B & M should continue to operate within one of the larger systems being developed in the East," 330 I. C. C. at 822, scarcely meets N & W's point that it should not be compelled to issue stock worth $10,000,000 for B & M shares that might be found worthless in a reorganization three years hence. Here again N & W is seeking certainties beyond what life affords. It is hard to believe that bondholders who have twice extended maturities to a deficit-ridden railroad beset with management conflicts would refuse to do this for a property well on the way to recovery under the control of one of the most efficient carriers in the east. Moreover, if the Commission's forecast of earnings is correct, the B & M stock would not be worthless in reorganization; one of the very purposes of §77 of the Bankruptcy Act is to preserve the equity of stockholders when insolvency has been precipitated by inability to meet maturities. See *Continental Illinois Nat'l Bank & Trust Co.* v. *Chicago, R. I. & P. Ry.*, 294 U. S. 648, 672 (1935).

The Possibility of Non-Inclusion of D & H and/or B & M.

N & W's final argument relates to the possibility that less than all three roads may in fact accept inclusion. The Commission's finding that inclusion of D & H was in the

public interest was predicated on actual inclusion of E-L and a similar finding as to inclusion of B & M hinged on actual inclusion of both E-L and D & H, 330 I. C. C. at 868. Affirmative action by E-L's stockholders has now assured its inclusion if the present terms stand. Although D & H's board of directors has unanimously voted to recommend similar action to its stockholders, there is a theoretical possibility that the necessary vote might not be forthcoming even though rejection would forfeit D & H's right to ask the Commission to compel Penn-Central to take it over on equitable terms, 330 I. C. C. at 868-69. And although D & H is included, B & M's stockholders might reject the terms despite the fact that in such event (although not in the case of rejection by D & H), B & M would lose the right to ask the Commission to compel its inclusion in Penn-Central. Yet, says N & W, all the figures of traffic gains, of losses to Penn-Central, and of protection of N & W revenues against Penn-Central diversion proceeded on the assumption that all three roads would be included, and the values fixed for E-L and D & H will be excessive if this does not occur.

The record, which contained not only a study of the gains from inclusion of all three roads (the "four-way" study) but studies of the gains from the inclusion of each, supports the earnings ratio established for E-L even on the assumption that neither D & H nor B & M is included. The "four-way" study, adopted by the Commission, details the traffic each of the roads is expected to reroute to the others. It demonstrates that only $1.25 million will be added to E-L revenues by inclusion of D & H and B & M. See chart at 330 I. C. C. at 834, line 2, columns 2-4. The data submitted in E-L's "two-way study" supports this. But a revenue loss of $1.25 million will reduce E-L's added net

income by only some $500,000—a difference that is not critical in light of the many "cushions" we have analyzed. Similarly, if B & M is not included, D & H's revenue from rerouting would have to be reduced by only $490,000, see chart at 330 I. C. C. at 834, line 3, columns 3-4, which amounts to a reduction of only $200,000 in net income. N & W's only challenge to this proceeds on a basis already considered and rejected, see fn. 20.

N & W answers that the effect of non-inclusion on the traffic gains of included roads is only a small part of the story. An even larger part, it says, is that non-inclusion of one or more lines would increase the losses the included ones would suffer to Penn-Central and decrease their ability to protect N & W from diversion; yet the Commission made no findings about this. The number of hypotheses to be considered were so numerous[36] that any attempt to make detailed studies of all of them not only would have protracted an already long proceeding but would have introduced so many elements of speculation concerning the traffic policies of each road and the susceptibility of shippers to them as to render the endeavor almost ludicrous. Although N & W as custodian of the figures and knowledge had the burden of presenting evidence that would permit a judgment of the degree to which

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36 Assuming E-L to be included in N & W in all cases, the following hypotheses, in addition to inclusion of all three roads, would have had to be separately analyzed:

D & H	*B & M*
(1) Independent	Independent
(2) Independent	In Penn-Central
(3) In Penn-Central	Independent
(4) In Penn-Central	In Penn-Central
(5) In N & W	Independent
(6) In N & W	In Penn-Central

petitioners would protect its traffic, it failed to do that even on the assumption that all three were included, let alone on less probable eventualities. As to the other question —the extent to which the lines that accepted inclusion would suffer increased losses to Penn-Central as a result of their brethren rejecting the terms—the Commission did deal with the only such hypothesis having reality.[37] It cited Commissioner Webb's finding that, "Without B & M in the N & W system, it can also be properly assumed that the traffic losses of E-L and D & H to a Penn-Central system would be somewhat larger than estimated with B & M controlled by N & W." 330 I. C. C. at 840. The assumption that the losses would be only "somewhat larger"[38] was within the Commission's expert competence in the absence of detailed contrary evidence. If B & M is not included but remains independent, it would have the strongest reasons for continuing and developing the historic interchange of New England traffic with D & H at Mechanicville, N. Y., especially with that carrier a part of a vigorous N & W system and possessed of trackage rights over PRR between Wilkes-Barre, Pa., and Hagerstown, Md., rather than exchanging such traffic at Rotterdam Junction, N. Y., with Penn-Central which would have several routes of its own into New England. While the situation would, of course, be different if B & M were to become part of Penn-

37 For reasons developed in section IV of this opinion we cannot take the prospect of non-inclusion of D & H at all seriously.

38 Commissioner Webb added, "Again, the amount of such additional loss cannot be determined from the record but it would not be so large as to alter the ultimate conclusion reached in this section of the report." Report, p. 66. Although the Commission did not explicitly adopt this recommendation, we find no basis for N & W's contention that the Commission disavowed findings not reproduced in Appendix A. To the contrary, adoption of this finding seems implicit in its order. See *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186 (1935).

Central, it is at least questionable that this will be permitted over N & W's objection, for reasons indicated in Mr. Justice Brennan's concurring opinion in *Baltimore & Ohio R.R.* v. *United States, supra,* 386 U. S. at 408-09; in any event it is inconceivable that the Commission would approve inclusion of B & M in Penn-Central without imposing conditions to safeguard the Mechanicville interchange to the maximum feasible extent. With all the weapons available in the Commission's armory to deal with this situation, it was not required to anticipate the problem and attempt to make findings dependent on so many contingencies as to be illusory.

N & W asserts, however, that the contrary evidence to which we have alluded is furnished by testimony of E-L Traffic Vice President Schmidt in the Penn-Central case, in which he asserted, based on a study of one month of 1961, that as an independent railroad E-L would probably suffer losses of $44 million to Penn-Central. But the Hearing Examiners in that proceeding described Schmidt's estimate as "highly exaggerated," p. 374.[39] In the instant proceeding Schmidt testified that if E-L alone merged with N & W, its losses to Penn-Central would be $8.5 million; he made no estimate as to the losses if E-L were included as a subsidiary.

Still further considerations support the Commission's action as to D & H. N & W does not dispute the evidence indicating that even if D & H were an *independent* carrier, it would lose only $1.3 million more in revenue to Penn-Central than if *all three roads* were included in an N & W

39 In the course of the inclusion proceeding N & W counsel characterized Schmidt's study as "very curious" and said, "we were unable to trace [it] through with any degree of particularity and were unable to develop anything helpful in a numerical way in the cross of Mr. Schmidt." Transcript pp. 3275-76.

system. Even if that same figure be used for D & H as part of an N & W-E-L-D & H system, the impact on net income would be offset by the $565,000 in control savings—itself a low estimate even if N & W does not merge with D & H as it apparently could—which were not credited to D & H on the cash option that N & W requested and will almost certainly exercise.

To summarize, there is a sufficient finding, supported by adequate evidence, that B & M's non-inclusion would not undermine the fairness of the terms set for the inclusion of E-L and D & H. While the Commission made no finding as to E-L's Penn-Central losses in the event that D & H also were not included, rejection by D & H's stockholders is so unlikely, as we will later show, that we will not reverse on that ground. The mandate of §8(b) of the Administrative Procedure Act for reasoned findings and conclusions on all material issues should not be read as requiring agencies to deal in a detailed way with every possibility no matter how unlikely, or as directing a reviewing court to close its eyes to realities in pursuit of academic perfection. Presumably Congress intended that administrators should be able to administer. Moreover, it would have been wholly impracticable for the Commission to ask E-L and D & H to go to their stockholders with purchase prices sliding downward in the event of adverse action by stockholders of other roads. The Commission exercised the best over-all judgment it thought possible under the circumstances, and its valuations for E-L and D & H must be taken to have encompassed the possibility that all three roads might not enter their new home. Compare *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R.R.*, 318 U. S. 523, 538-39 (1943).

Complaint of E-L Bondholders.

John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, Aid Association for Lutherans and Woodmen of the World Life Insurance Society, holding large amounts of E-L bonds, ask for "equitable safeguards necessary to prevent the circumvention of their rights as bondholders." Their main point is that "N & W will have the incentive to use its control of New E L to increase the traffic and income of its own lines rather than those of New E L, e.g., by diversion of traffic and other benefits from New E L, to the detriment of New E L" and its bondholders. The alleged incentives are various—N & W can make more money by handling traffic on its own more efficient line west of Buffalo; while the present E-L stockholders have an interest in earning net income and paying the interest charges in order to clear the way for the declaration of dividends, N & W will prefer that New E-L should not have net income available for payment of the contingent interest and arrearages on the income bonds; and it will be glad to see the price of E-L bonds depressed in order to facilitate market purchases or tender offers.

Before submitting any plan for inclusion in N & W, E-L wrote thirteen of its major bondholders, including two of the plaintiffs, explaining both the greater advantages of merger and its disbelief that the Commission would approve this unless the E-L bondholders would consent to modification of the bonds. They refused. It was for this reason that E-L proposed stock control by N & W rather than merger, with attendant lesser economies and traffic gains and lower exchange ratios for its stockholders. The bondholders did not participate in the hearing before Commissioner Webb; on the last day for filing exceptions to

his Report, they sought leave to intervene and to file an exception asking the Commission to impose some sort of safeguard for their benefit.

We find no merit in the bondholders' complaint. The Interstate Commerce Act contemplates acquisitions of control by sale of assets subject to existing indebtedness as well as by merger or consolidation, which, as E-L correctly thought, would have been inequitable to N & W unless E-L's debt was modified. The bondholders do not contend that the indentures securing their bonds forbid a sale of assets. The smaller traffic gains and control savings estimated for E-L reflect N & W's inability in a control situation to do the very things the bondholders fear. While no one can guarantee that N & W may not abuse its position, courts of equity will still sit. The safeguards the bondholders seek are furnished in large measure by the principle of fiduciary responsibility recognized in such leading cases as *Farmers Loan & Trust Co.* v. *New York & Northern Ry.*, 150 N. Y. 410 (1896), and *Southern Pacific Co.* v. *Bogart*, 280 U. S. 438 (1919). If they wished more than this, they should have developed a record at the hearing and then come forward with specific suggestions. Failing to have done this, they cannot properly request a remand.

IV. Injunction or Stay of Consummation of the Penn-Central Merger

We now return to the merger cases and consider the Commission's determination that, with the Appendix G conditions revised and effective, the public interest requires consummation of the Penn-Central merger "at the earliest possible date," 330 I. C. C. at 361.

Ever since the Supreme Court reversed our denial of a temporary injunction, the parties have been in bitter dis-

agreement as to the meaning of its opinion. There was no need for immediate decision on our part since there could be no dispute that the Court intended the merger to be enjoined until the Commission had finalized the Appendix G traffic and financial conditions and had decided the applications of the three roads for inclusion in N & W. In our order of April 28, 1967 we therefore took a Delphic stance, enjoining consummation "pending the completion of the proceedings directed by the Supreme Court." In our memorandum order of July 3, 1967, we reviewed the conflicting contentions and the passages of the Court's opinion relied on to support them. We tentatively concluded that the Court had not directed us forthwith to enter an order enjoining consummation until all details of the inclusion of the three roads were resolved but, on the other hand, that as a matter of discretion we should extend the injunction at least until our own final determination in the merger cases "and thereafter for such further time, if any, and to such extent and on such terms as this Court may then direct." We have now decided not only the merger cases but also the *Inclusion* case, and must face the issue whether we must or should continue the injunction against consummation of the Penn-Central merger and, if so, for how long.

Because of our desire to obtain all available light on the Supreme Court's intentions, we requested the parties to furnish us with any excerpts from the briefs or arguments before it that might be helpful. While the help is limited on any view, since the Court cannot be assumed to have adopted the position of any party, the excerpts from the argument confirm our belief that the broad construction urged by some of the parties is unwarranted. Of particular importance is the passage where the then Solicitor General, now Mr. Justice, Marshall restated "the position of the

United States in this case" at the close of the argument—apparently departing somewhat from that taken in brief, 386 U. S. at 384-85. The position was "that the consummation of the Penn-Central merger ought to be delayed until the Commission has, (1) determined the fate of the smaller roads adversely affected by the merger, and, (2), has provided for the interim protection until the inclusion. This does not, of course, mean that we urge a stay of consummation until all of these judicial review proceedings are completed, the two-year forecast, the two and a half, the five year, and the if ever forecast. For the present our only point is that the Commission should not let Penn and Central merge until it has satisfied itself what to do about these railroads, the smaller ones. That does not mean the consummation must be delayed until the small roads are actually included in any of the systems. Once the Commission has finally decided their fate, the mechanics of the inclusion can wait so long as interim protective conditions are in ...." It is also of interest that counsel for E-L and D & H, along with B & M the objects of the Supreme Court's concern, stressed in their argument to the Court, as they had to us, that their complaint related to the Commission's failure to finalize the protective conditions. Only the argument of N & W and its allies that it was entitled to know exactly what Penn-Central would or would not include, since competition with a Penn-Central system containing the three roads would be more onerous than if these were in N & W, would be consistent with the broad reading now urged; the short answer to this would seem to be that the interests of N & W and those making common cause with it are protected by their right to oppose and challenge any future order including any of the three roads in Penn-Central. Consideration of the argument thus buttresses our

conclusion drawn from the passages of the opinion, 386 U. S. at 378, 390 and 392, cited in our previous order, that the Supreme Court has not directed a further injunction but has left that issue to be determined by application of the principles governing judicial review of administrative action to the facts before us.

E-L and D & H (but not B & M), together with N & W and its allies, argue, with various nuances of difference, that the public interest forbids consummation until doubts as to the future of the protected roads are finally resolved. The remaining doubts are of two sorts. One, developed in section III of this opinion, relates to stockholder action—the stockholders of D & H may reject inclusion, thereby also precluding inclusion of B & M, and stockholders of the latter may do so on their own. The other uncertainty concerns possible Supreme Court reversal of our decisions, more particularly a reversal in the *Inclusion* case which by requiring less favorable terms would call into question the action already taken by stockholders of E-L and would enhance the risk of adverse action by stockholders of D & H and B & M. Doubts of the first type are those to be considered in making our own decision whether to continue the injunction. If we rule against this, the second set of considerations is relevant to determining whether to grant a stay pending appeal.

We find ourselves unable to take seriously the possibility that D & H stockholders will reject their directors' unanimous recommendation to accept the inclusion terms. The cash price fixed by the Commission works out at $41.79 per share as against an average 1967 market price until the date of decision of about $34, 331 I. C. C. at 33. The prospect of operating as an investment company with some $66,000,000 in cash and substantial tax credits appears con-

siderably brighter than that of continuing as a small independent railroad seeking better terms from N & W or attempting to work out a voluntary agreement with Penn-Central. While the situation as to B & M differs since the price fixed by the Commission for its stock is well below the current market, that carrier not only does not seek continuation of the injunction but actively opposes it, believing that consummation of the Penn-Central merger is needed to prod N & W into offering what it considers realistic terms. Even if B & M should be overly sanguine about this, a court has no duty, very likely even no right, to give it a protection it does not wish, and its non-inclusion in N & W will not impede the inclusion of E-L and D & H nor, on our view, require any change in the terms the Commission has fixed. When the case was last here, the principal, indeed almost the sole, bone of contention among the parties, and the only issue that caused division among us, was the argument that although the Commission had found Appendix G conditions to be necessary, it had not in fact prescribed them in definitive form—in Judge Weinfeld's words, "that the rescission of one of the conditions and the reopening for further consideration of the other conditions originally imposed by the Commission for the protection of" E-L, D & H, and B & M "as a prerequisite to the merger requires the granting of the interlocutory injunction." The Commission has now done what the Supreme Court directed it to do, and has expressly found that, subject to the conditions it has prescribed, "the public interest requires that the applicants be permitted to commence achieving the substantial savings which their merger will make possible at the earliest possible date;" that "the shipping public should not be denied the improved service which ultimately the merged company can provide;" that it was "unwilling to take the risk that further delay in consummation of the

merger may mean that it will never occur—and that New Haven will not be included in a larger rail system;" and that it was particularly unwilling to do this in view of the demonstration in its report in F. D. 21510 "that inclusion of E-L, D & H and B & M in the N & W system is both consistent with the public interest and feasible, and in view of the fact that the instant report provides for those lines pending their actual inclusion even stronger interim protection than did our prior report." 330 I. C. C. at 361. We would not feel warranted in overruling the Commission's informed judgment, concurred in initially by all three of the affected railroads and still accepted by B & M, that proper Appendix G conditions take sufficient care of them while they work out their future, which, if our order in the *Inclusion* case stands, is practically assured for the only two that protest.

The final question is whether, although denying a further injunction, we should grant a stay pending appeal to the Supreme Court. The criteria were authoritatively stated by Mr. Justice Brandeis in *Virginian Ry.* v. *United States*, 272 U. S. 658, 673 (1926):

> "To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

Although appraising the correctness of one's own decision is a tricky business, we entertain no doubt with re-

spect to our rulings in the merger cases. The only issue that seems at all debatable is the capital loss indemnity and, as we see it, the Supreme Court could correct any error on our part even after consummation; moreover, the issue would become academic as to the protected roads if the Court should affirm us in the *Inclusion* case. While that case has presented considerably more difficulty as our discussion has shown, we have no "serious doubt" we have reached the right result. The fact that the criticisms mainly relate to subsidiary findings, or the lack of them, rather than to the Commission's ultimate conclusions works against the probability of reversal. In *Massachusetts Trustees* v. *United States*, 377 U. S. 235, 248 (1964), the Court made plain that *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), so heavily relied on by N & W, was intended only to establish the important point that a reviewing court could not affirm an agency on a principle the agency might not embrace—not to require the tedious process of administrative adjudication and judicial review to be needlessly dragged out while court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings.

Moreover, if the Supreme Court should disagree with our decision in the *Inclusion* case, it would not itself establish different terms but would direct a remand to the Commission. If the remand were for the purpose sought by B & M, this would in no way prevent inclusion but rather would facilitate it. On the other hand, if the remand were on N & W's appeal, our discussion has revealed many ways by which, in our view, the Commission could support terms as favorable as it has established even if the Court should have held some of its subsidiary findings to be insufficient. We thus cannot foresee any substantial likelihood that action by the Supreme Court will worsen the chances of the three roads' inclusion in N & W.

Since our decision does not conflict with that of any other court, we are thus left with the question whether there is "some other special reason" for a stay. As to this we would be inclined to regard the irreversibility of the Penn-Central merger, see 386 U. S. at 391-92, and the Supreme Court's obvious interest in this case as reasons sufficient to warrant a few months' delay if it were not—and the "if" is a literally vital one—for the critical situation of the New Haven.

No one has contested the forecast of the NH Trustees that their cash will run out at the end of 1967; no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central. Despite our utmost efforts to expedite the argument and decision of these cases, we are now in late October, and the appeal of our previous order of early October 1966, handled by the Supreme Court on an expedited basis, was not decided until late March 1967. While these facts are unpleasant, they are nonetheless inexorable. For our part we are unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed; indeed we believe we have no right to do so. Whether the Supreme Court may think differently or would wish to hear an appeal either of the entire case or of some part of it on an even more expedited basis that would permit a decision prior to December 31, 1967, no one else can determine. We therefore stay consummation of the merger only for fifteen days and if within that period a notice of appeal to the Supreme Court is filed and application for a stay is made to it, until the determination of such application or other order of the Court or the Circuit Justice.

Judgment

The clerk is directed to enter judgment as follows:

(1) All complaints and intervening complaints in 66 Civ. 2860, in 66 Civ. 2903, and in 66 Civ. 2914 except that of The Central Railroad of New Jersey, are dismissed. The court finds there is no just reason for delay in the entry of judgment dismissing the other complaints in 66 Civ. 2914 and so directs, F. R. Civ. P. 54(b).

(2) The complaint and intervening complaint in 66 Civ. 3413 are dismissed without prejudice to any action plaintiffs may be advised to take with respect to any further order in F. D. No. 21989 relating to temporary assistance to the New Haven or the inclusion of the New Haven in Penn-Central.

(3) All complaints (including that of N & W as involuntary plaintiff) and intervening complaints in 67 Civ. 2451 are dismissed. Enforcement of the order of the Commission in F. D. 21510 with respect to N & W is stayed until fifteen days from the date of this order, and if within that period N & W files a notice of appeal to the Supreme Court of the United States and prosecutes said appeal in accordance with the rules of said Court, until the determination thereof.

(4) The portion of the Commission's order in F. D. 21989 authorizing immediate consummation of the Penn-Central merger and the beginning date of the 180-day period fixed by the Commission in its order served June 12, 1967, for exercising the authority there conferred, are stayed until fifteen days from the date of this order, and if within that period a notice of appeal to the Supreme Court is filed and an application for a further stay is made to that Court, until the determination of such application or other order of the Court or the Circuit Justice. Except to the limited

extent provided in this paragraph all applications for injunctions against consummation of the Penn-Central merger are denied.

HENRY J. FRIENDLY
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

RICHARD H. LEVET
Senior U.S.D.J.

October 19, 1967.

ADMINISTRATIVE PROCEDURE ACT

Section 7(d), 5 U.S.C. § 556(e).

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Section 8(b), 5 U.S.C. § 557(c).

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(a), 5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(c), 5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 10(e), 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory

provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

JUDICIAL CODE

28 U.S.C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. § 1398.

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

28 U.S.C. § 2101(b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or

decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. § 2284.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a

State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. § 2321.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. § 2322.

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. § 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49,

in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2324.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. § 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in

part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

INTERSTATE COMMERCE ACT

Section 5(2), 49 U.S.C. § 5(2).

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or

person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19.

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

Rule 82.

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.

FILED
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JOHN F. DAVIS, CL

Nos. 778 and 779

Supreme Court of the United States

October Term, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al.,
Appellants

v.

UNITED STATES OF AMERICA, et al.,
Appellees

NORFOLK AND WESTERN RAILWAY COMPANY
Appellant

v.

UNITED STATES OF AMERICA, et al.,
Appellees

On Appeals from the United States District Court for the Southern District of New York

MOTION TO ADVANCE

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Supreme Court of the United States

October Term, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants

v.

UNITED STATES OF AMERICA, et al.,

Appellees

NORFOLK AND WESTERN RAILWAY COMPANY

Appellant

v.

UNITED STATES OF AMERICA, et al.,

Appellees

On Appeals from the United States District Court for the Southern District of New York

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MOTION TO ADVANCE

Come now appellants Baltimore and Ohio Railroad Company, et al., referred to generally as the "unprotected railroads," and pray that this Court enter an order setting an expedited procedure for the determination of the appeals in this extraordinary case.

In support of this motion appellants respectfully show as follows:

1. These are appeals from a final judgment of a three-judge court which (1) dismissed complaints seeking injunctive relief with respect to an order of the Interstate Commerce Commission permitting immediate consum-

mation of a merger of the Pennsylvania Railroad and the New York Central Railroad and (2) dismissed Norfolk and Western's complaint seeking to set aside a Commission order directing N&W to include Erie-Lackawanna, Delaware and Hudson, and Boston and Maine in its system on prescribed terms. The background facts and the nature of the very substantial questions presented by these appeals are set forth in the Jurisdictional Statements which are incorporated by reference herein to avoid repetition.

2. When the Penn-Central merger case was before this Court last year, the importance of the issues was stressed (*Baltimore & Ohio R. Co* v. *United States*, 386 U.S. 372, 392 (1967)):

> "After all, it [the Penn-Central merger] is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeast section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire nation."

3. As this Court thus recognized, assuming the consummation of the Penn-Central merger the basic issue affecting the public interest is how the remaining eastern railroads can be restructured to preserve their service in the face of the powerful Penn-Central system. The Court directed that this question be answered, stating that "the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads" (386 U.S. at 378). But this critical determination has still not been made.

4. Apart from the violation of this Court's mandate resulting from the Commission's failure to determine the "ultimate fate" of the three protected roads, additional serious legal errors creating grave injury to the public and the parties are raised by these appeals. As is shown in the Jurisdictional Statements, the Commission proceeded on a patently incorrect assumption of fact—that it had assured the inclusion of the protected lines in the existing Norfolk and Western system. This assumption was rejected by the court below which nevertheless upheld the Commission's order by supplying its own finding in the absence of any findings by the agency addressed to the realities of the situation. Because the consummation of Penn-Central is to be permitted before the inclusion of the protected lines in a major system has been settled, irreparable injury to the unprotected eastern railroads is threatened, injury which the Commission has never found to be consistent with the public interest.

5. In order to preserve the jurisdiction of this Court pending appeal, appellants have filed an application for stay before the Circuit Justice for the Second Circuit. The immediate threat of consummation of the Penn-Central merger, and the necessity for determination of the issues by this Court prior to consummation of that merger, urgently call for the establishment of a procedure that would preserve this Court's jurisdiction to decide the critical legal issues presented in respect to this unprecedented merger.

6. This Court has already indicated that expedited procedures are appropriate for both the *Inclusion* and

the *Merger* cases. Indeed, referring specifically to the *Inclusion* proceeding, the Court stated that expeditious handling is the means best calculated to assure that the public interest is protected and that the Penn-Central merger is not consummated without due regard for the serious harm it is capable of inflicting (386 U.S. at 392):

> "If its [the Commission's] order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties."

7. Moreover, it was recognized by the court below that, absent the New Haven problem, a stay was justified and that expedited treatment of this appeal would eliminate any possible adverse effects which a stay might otherwise have for the interests of the New Haven (J.S., App. B, p. 70). Although these appellants disagree with the view of the court below that the New Haven problem is a sufficient reason for permitting the immediate consummation of Penn-Central even before this Court has the opportunity to examine the substantial issues presented by these appeals, appellants seek an expedited hearing schedule which will avoid the dangers the court below feared.

8. This Court having already stated that both the *Merger* and the *Inclusion* cases should be handled expeditiously (386 U.S. at 390-92), this motion requests that both appeals be handled on the same expedited

schedule. The court below decided both cases at the same time, in a single opinion, and indeed relied upon its affirmance of the *Inclusion* order to justify its failure to grant the relief requested by these appellants in the Penn-Central action. Under this Court's mandate of March 27, 1967, the "decision as to the future of the protected railroads and their inclusion in a major system [must] be decided prior to consummation of the Penn-Central merger" (386 U.S. at 390). Inasmuch as substantial legal issues exist as to the validity of the Commission's order directing N&W to include the protected lines in its system, both appeals should be heard on the same expedited basis.[1]

WHEREFORE, appellants pray that an order be entered setting dates for the filing of briefs by appellants, and by appellees, and setting the case for oral argument on the jurisdictional papers and on the merits. In order that these appeals may be heard and decided as expeditiously as possible, appellants stand ready to argue

[1] When the *Merger* case was previously before this Court an expedited schedule was adopted. Erie-Lackawanna R. Co. v. United States, 385 U.S. 914 (1966). Similar procedures were followed in Hannah v. Larche, 361 U.S. 910 (1959) and Stack v. Boyle, 342 U.S. 1, 4 (1951).

their appeals on the basis of the jurisdictional papers in this Court and the briefs filed with the court below and included in the certified record filed with this Court.

Respectfully submitted,

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Nos. 778 and 779

IN THE

Supreme Court of the United States

October Term, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,
Appellees.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant,

—v.—

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO CONSOLIDATE, REPLY TO APPLICATION FOR STAY, STATEMENT AS TO ADDITIONAL QUESTION PRESENTED BY APPEALS, AND REPLY TO MOTION TO ADVANCE OF THE DELAWARE AND HUDSON RAILROAD CORPORATION

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November 6, 1967

IN THE

Supreme Court of the United States

October Term, 1967

Nos. 778 and 779

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Appellants,

—v.—

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NORFOLK AND WESTERN RAILROAD COMPANY,

Appellant,

—v.—

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO CONSOLIDATE, REPLY TO APPLICATION FOR STAY, STATEMENT AS TO ADDITIONAL QUESTION PRESENTED BY APPEALS, AND REPLY TO MOTION TO ADVANCE OF THE DELAWARE AND HUDSON RAILROAD CORPORATION

Appellants have filed a Jurisdictional Statement in each of these appeals together with a motion to advance both

appeals and, in the first entitled of the appeals, an application for stay of consummation of the Penn-Central merger.*

D&H moves to consolidate these appeals on the grounds set out in Part I hereof. The remainder of this document constitutes D&H's response to appellants' papers with the exception that, as noted in Part IV hereof, D&H proposes that if an expedited scheduling of these appeals is granted pursuant to appellants' motion to advance, D&H be granted leave to file a brief in reply to points made in the Jurisdictional Statements.

I. *Motion to Consolidate*

Appellants have filed two separate appeals from the single judgment of the District Court involving the Penn-Central *Merger* case (Appeal No. 778) and the N&W *Inclusion* case (Appeal No. 779). They have, however, in their motion to advance, proposed that "both appeals should be heard on the same expedited basis."

Concurring in their proposal as to hearing the cases on the same expedited basis, D&H hereby moves that the two appeals be consolidated. As both the single decision of the Court below and the papers filed by appellants make clear, the two matters are so interrelated as to require not merely that they be heard on the same expedited basis but that they be disposed of together, as in the lower Court.

As the Jurisdictional Statement in No. 779 says (p. 9), the N&W *Inclusion* case "was regarded by both the Commission and the district court as the key needed to unlock the benefits of the Penn-Central merger without destroying

* Abbreviations herein used are those employed in appellants' papers.

three railroads now providing essential transportation service to the public." Certainly the Supreme Court regarded the two proceedings as necessarily intertwined when in *Baltimore & O. R.R. Co.* v. *United States,* 386 U.S. 372 (1967), it required deferral of the Penn-Central merger pending conclusion of the pending inclusion proceedings. The fundamental interrelationship of the two appeals is further apparent from Parts II and III hereof.

As the Commission itself stated below in the Penn-Central case (August 28, 1967 brief, pp. 10-11), consummation of the Penn-Central merger should be dependent upon the absence of "basic infirmity" in the Commission's order in the N&W *Inclusion* case. While we disagree wholeheartedly with virtually everything said in N&W's Jurisdictional Statement in the *Inclusion* case, it cannot be denied that N&W has advanced contentions which if upheld would certainly establish "basic infirmity" in the Commission's order therein.

For these reasons D&H urges that the two appeals be consolidated.

II. *Reply to Application for Stay*

Grant of the motion for consolidation and of the motion to advance, hereinafter discussed, would seem to make it unnecessary to deal with the appellants' application for stay in the *Merger* case.* However, if this should not be the case, D&H wishes now to record the fact that it is compelled, in view of the appeals that have been taken by N&W and its allies, to support their application for stay on two grounds:

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* By reason of the filing of the application for stay and notice of appeal, a stay in the *Merger* case is now in effect under the judgment of the District Court (Jurisdictional Statement, B-71).

1. Appellants in No. 778 are urging in their Jurisdictional Statement that the revised provisions of Appendix G established in the Commission's Report of June 9, 1967 in the Penn-Central *Merger* case, 330 I.C.C. 328, 362-69, are unlawful. These provisions are designed to provide interim protection for D&H, as well as EL and B&M, prior to their inclusion in a major system, and this Court on March 27 of this year held that the authorization of immediate consummation of the Penn-Central merger without such protection was patently invalid. *Baltimore & O. R.R. Co.* v. *United States, supra* at 388-90.

In view of the appeal in No. 778, it is obvious that it cannot yet be said that D&H, EL and B&M will have lawful interim protection if Penn-Central is consummated now. The District Court held (Jurisdictional Statement, A-16) that injunctive relief deferring consummation of the Penn-Central merger "would doubtless be required" if the revised Appendix G were determined to be unlawful. Certainly a stay of the merger pending determination of such lawfulness is likewise required.

2. Furthermore, even if the lawfulness of the Appendix G conditions for interim protection were not in issue, a stay of the Penn-Central merger pending determination of N&W's appeal in the N&W *Inclusion* case, No. 779, would also be necessary in view of this Court's decision in *Baltimore & O. R.R. Co.* v. *United States, supra.* The Court held, 386 U.S. at 390, that "it is necessary that the decision as to the future of the protected roads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger". The Court also phrased its holding this way: "We believe that the Commission erred in approving the immediate consummation of the merger

without determining the ultimate fate of the protected roads" (*id.* at 378). So long as N&W's appeal in the *Inclusion* case is pending, D&H's future and its inclusion in a major system have not been decided.

Although concluding (Jurisdictional Statement, B-68) that the Appendix G protection would "take sufficient care of them [the protected roads] while they work out their future," * the Court below has indicated (*id.* at B-70) that in view of the Supreme Court's decision, the District Court would itself have stayed consummation of the Penn-Central merger pending appeal as to either the *Merger* case or the *Inclusion* case if it were not for the critical need of NH for cash support to continue to perform its operations. However, as set out in appellants' application for stay (pp. 6-8), there is no assurance at this time that if Penn-Central were now consummated continuance of NH's service would thereby be preserved. Unless and until such assurance exists there appears to be no basis for the lower Court's denial of stay of the merger pending this Court's disposition of N&W's appeal in the *Inclusion* case.

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* In this connection the District Court observed (Jurisdictional Statement, B-10) that D&H made no objections to the Appendix G conditions. While D&H did not challenge the specifics of those conditions because it believed them to involve a matter on which the courts would defer to administrative expertise, D&H contended in the Court below that the Appendix G plan of interim protection contains inherent limitations which make it less effective protection for D&H from the traffic consequences of a Penn-Central system than inclusion of D&H in a major system (Brief of September 5, 1967, in the *Merger* case, pp. 18-20). The Commission has itself noted some of the reasons why the traffic restrictions of Appendix G would be of limited value (330 I.C.C. at 344). The revenue indemnity formula likewise contains no complete assurance of protection because the formula is such that considerations having nothing to do with diversion of traffic to Penn-Central affect the amount of indemnity payable (*id.* at 351), and thus might eliminate all indemnity even though D&H were to sustain substantial diversion of its traffic to Penn-Central.

III. *Statement as to Additional Question Presented by Appeals*

Pursuant to Rule 10 of the Rules of the Supreme Court, D&H makes the following response in respect of appellants' Jurisdictional Statements:

In view of N&W's appeal in the *Inclusion* case, No. 779, and solely because of such appeal, D&H supports the appeal of N&W and its allies from the decision in the *Merger* case, No. 778, to the extent of their position that under the decision of this Court in *Baltimore & O. R.R. Co. v. United States, supra,* the Penn-Central merger must be delayed until there is a final decision assuring D&H of inclusion in N&W (or failing that, some other major system).

In addition thereto, D&H asserts that a further question is presented in the Penn-Central *Merger* case, again solely because of N&W's appeal in the *Inclusion* case. That question is: Did the District Court err in failing to hold that the Commission should have reserved jurisdiction to provide for capital loss indemnity by a Penn-Central system running to D&H (and/or of any other road on whose inclusion in the N&W system D&H inclusion in that system is made dependent*) in the event of a downward revision (on account of the traffic consequences of a Penn-Central system) of the terms for inclusion of D&H and/or such other road in the N&W system which may be required as a result of judicial review of the N&W *Inclusion* case?

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* Under the terms of the Commission's decision in the *Inclusion* case, D&H inclusion in N&W is made dependent upon the inclusion of EL in N&W (331 I.C.C. 22, 43 (1967)).

This question is a substantial one. The possible need for capital loss indemnity is founded on the desirability in the public interest of maintaining rail competition to the extent feasible after consummation of a Penn-Central system. There would be no substantial rail system competition by United States roads in the area east of Buffalo, N.Y., unless EL, D&H and B&M are included in a system other than Penn-Central, and, as the Commission found in its first Report in the Penn-Central *Merger* case (327 I.C.C. 475, 532 (1966)), it is doubtful that without inclusion in a major system, D&H, EL and B&M could survive the competition of a Penn-Central system. N&W's present lines do not run east of Buffalo or north of Hagerstown, Md., and therefore the inclusion in the N&W system of the three roads, with their lines from Buffalo to New York City, Northern New York, Montreal and New England, is a logical step to provide routes in the Northeast competitive with those which Penn-Central would have (330 I.C.C. 780, 792 (1967)). The Commission has stated in the N&W *Inclusion* case (*id.* at 796) that because of the effects on competition, it is "firmly convinced" that inclusion of D&H, EL and B&M in N&W is preferable to their inclusion in Penn-Central.

However, N&W has urged that the traffic losses of the protected roads to Penn-Central would not be offset by traffic gains resulting from their inclusion in the N&W system and that N&W should not be required to include those roads except on terms reflecting a substantial downward adjustment in the price it would otherwise pay (see, e.g., Jurisdictional Statement, No. 779, p. 12, n. 6; N&W's brief of September 5, 1967 in the *Inclusion* case, pp. 18-31). The position of D&H—and of EL and B&M—has been

that no such adjustment is justified but that if such an adjustment were ultimately held to be required, they should be indemnified by Penn-Central on account thereof, because otherwise it would be impossible to include those roads in a competitive system—N&W—on fair terms.

The District Court's opinion has recognized (Jurisdictional Statements, B-16-17, 69) the significance of this issue if the Supreme Court does not affirm its decision in the N&W *Inclusion* case. The District Court has there pointed out that if the *Inclusion* case is reversed, this Court might in the *Merger* case direct the Commission to consider the matter of capital loss indemnity in further proceedings in the *Merger* case. This follows a suggestion made by the Commission on brief below (August 28, 1967 in the *Merger* case, p. 14). D&H urges that this Court so direct the Commission in the event the *Inclusion* case is remanded.

IV. *Reply to Motion to Advance*

D&H agrees with the appellants that the appeals should be expedited in the public interest. To this end D&H supports appellants' suggestion that the appeals be argued on the basis of the jurisdictional papers in this Court and the briefs filed below, with one obviously necessary amendment: that each appellee be entitled to file a brief in reply to the Jurisdictional Statements. We suggest this brief be due on the day prior to the oral argument before this Court. This procedure would eliminate the right of D&H and other appellees to file motions to affirm without argument. However, in view of the situation described by the Court below (Jurisdictional Statements, B-70), and referred to in appellants' motion to advance and, of course,

considering the fact that it cannot be certain that such motions would be granted, D&H is willing to dispense with this right in the interest of expedition.

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Nos. 778 and 779

BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
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NORFOLK AND WESTERN RAILWAY COMPANY,
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UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO CONSOLIDATE AND TO ADVANCE FOR IMMEDIATE ARGUMENT ON THE BRIEFS BELOW AND STATEMENT OF ADDITIONAL QUESTION PRESENTED IN NO. 778

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*, *Appellants*, v. UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 778
NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant*, v. UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 779

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO CONSOLIDATE AND TO ADVANCE FOR IMMEDIATE ARGUMENT ON THE BRIEFS BELOW AND STATEMENT OF ADDITIONAL QUESTION PRESENTED IN NO. 778

Erie-Lackawanna Railroad Company (EL) hereby moves (1) to consolidate the appeal of the Norfolk & Western Railway Company (N&W) in *Norfolk & Western R.* v. *United States*, No. 779, with the appeal of the Baltimore & Ohio Railway Company, The Chesapeake and Ohio Railway Company, N&W, and Western Maryland Railway

Company in *Baltimore & Ohio R. R.* v. *United States,* No. 778; the appeals of the Boston and Maine Corporation (B&M) and John Hancock Mutual Life Insurance Company *et al.* in *The Delaware and Hudson R. R.* v. *United States,* Nos. and ; the appeal of City of Scranton and Milton Shapp in *Erie-Lackawanna R. R.* v. *United States,* No. ; the appeal of Oscar Gruss & Son (Gruss) and the New York, New Haven & Hartford Railroad Company First Mortgage 4% Bondholders Committee (NH Bondholders) in *Oscar Gruss & Son* v. *United States,* No. ;* and any other appeals taken from the October 19, 1967, decision of the three-judge district court in *Erie-Lackawanna R. R.* v. *United States* (S. D. N. Y., 66 Civ. 2860 and related cases), and (2) to advance that consolidated case for immediate argument on the briefs below, the jurisdictional papers, and any briefs in response thereto filed by appellees prior to argument, pursuant to the suggestion by appellants in their joint Motion to Advance in Nos. 778 and 779, at 4-6. As grounds for said motion, EL respectfully states as follows:

1. Consolidation is warranted for the following reasons:

(a) Appellants have brought six separate appeals from a single, unanimous decision of a statutory three-judge district court which (1) upheld the decision of the Interstate Commerce Commission (the Commission) in Finance Docket No. 21510, see 330 I. C. C. 780 and 331 I. C. C. 22, directing the N&W to include EL, The Delaware and Hudson Railroad Corporation (D&H) and B&M on specified terms (the *Inclusion* case), and (2) upheld the Com-

*As of this writing, jurisdictional statements have been filed in Nos. 778 and 779 only, although notices of appeal have been filed in the other actions listed and applications for a stay have been filed by appellants Gruss and NH Bondholders.

mission's decision in Finance Docket Nos. 21989 and 21990 (the *Merger* case), see 327 I. C. C. 475, 328 I. C. C. 304 and 330 I. C. C. 328, authorizing the merger of the Pennsylvania Railroad Company and The New York Central Railroad Company into a single system (Penn-Central). The district court recognized the fundamental intertwining of the issues in the two proceedings and, without formally consolidating the various actions brought to review those Commission orders, disposed of all the actions in a single opinion and judgment.

(b) The jurisdictional papers in Nos. 778 and 779 demonstrate that the two matters are so interrelated that they can only properly be disposed of together. Thus, in No. 779, N&W makes essentially one argument, that particularly in light of the impact of Penn-Central upon EL, D&H and B&M, N&W should not be required to include those three roads at the price set by the Commission. Similarly, appellants in No. 778 argue essentially that the Appendix G conditions imposed by the Commission upon Penn-Central for temporary protection of EL, D&H and B&M until they can be included in N&W, are somehow improper or unlawful.

(c) This Court itself recognized the interrelation of the two Commission proceedings now sought to be reviewed, when in *Baltimore & Ohio R. R.* v. *United States,* 386 U. S. 372, 378, it reversed an earlier decision of the district court approving the Penn-Central merger, on the ground that "the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads". The "ultimate fate" of EL, D&H and B&M (the "protected roads") is dependent upon the outcome of the appeals here sought to be consolidated.

2. Immediate argument is warranted for the following reasons:

(a) Preliminarily we note that the issues thus far raised by appellants are so patently unsubstantial as to warrant affirmance without further argument. Appellants' arguments, indicated in the jurisdictional statements filed thus far, have no general significance, and have been made to and considered and rejected by both the Commission and the court below.

(b) Thus, N&W's Jurisdictional Statement in No. 779, the *Inclusion* case, stripped of its surplusage, merely urges that the Commission's decision requires N&W to pay too high a price for EL, D&H and B&M. Obviously that issue has been fully and even elaborately canvassed by the Commission and the court below. N&W asks this Court simply to substitute its judgment for that of the Commission or to do that which the court below refused to do: "engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings." Jurisdictional Statement in No. 779, at B-69.

(c) Appellants in No. 778, the *Merger* case, present five questions, each of which has significance only if this Court reverses the district court's decision in the *Inclusion* case. Appellants' only real argument is that the provisions of Appendix G to the Commission's report of June 9, 1967, 330 I. C. C. 328, which provide interim protection for EL, D&H and B&M prior to their inclusion in a major system, are unlawful.

(d) By reason of the foregoing, EL submits that the decision of the court below could properly be affirmed in all respects without further argument. However, because of the size and impact of the *Merger* and *Inclusion* cases, the

number of parties and issues and because of the time necessarily involved in motions to affirm, stay applications, etc., EL makes this motion in an effort to cut through some of the time-consuming procedural aspects and reach the merits.

(e) EL agrees with the Motion to Advance filed by appellants in Nos. 778 and 779 that the public interest requires that the appeals be expedited. This Court has itself recognized that in its previous consideration of the Penn-Central merger, where it noted, referring specifically to the *Inclusion* case, "If its [the Commission's] order is attacked in court the hearing there can be expedited, as was this one, and an early determination made." 386 U. S. at 392. The court below entered a stay of the consumation of the Penn-Central merger only for 15 days, or until the determination of any application to this Court for a stay. The court noted that the *Merger* case would be an appropriate case for a stay pending appeal, were it not for the critical situation of the bankrupt New York, New Haven & Hartford Railroad Company (NH). EL is unwilling, as the court below was, "to take responsibility for such devastating hardship as even the temporary cessation of NH operations would bring to New England and New York and to a lesser degree to other sections of the country". Jurisdictional Statement B-70. Therefore, rather than immediately joining in the application for a stay filed by appellants in No. 778, EL has instead requested the consolidation, immediate argument and expeditious disposition of these appeals.

(f) If the relief requested by EL in this motion is not granted, it will be forced to join in the application for a stay of the Penn-Central merger. The Commission has recognized that "it is doubtful that, without inclusion in a major

system these three carriers [EL, D&H and B&M] could withstand the competition of the applicants merged [Penn-Central]". 327 I. C. C. at 532. Moreover, this Court itself has held that "it is necessary that the decision as to the future of the protected roads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger". 386 U. S. at 390. The Commission has determined that the three roads should be included in the N&W system and has provided interim protection to the three roads through the Appendix G conditions. However, both the determination in the *Inclusion* case and the imposition of the protective conditions in the *Merger* case have now been attacked in this Court. Should the inclusion order be reversed and the protective conditions struck down by this Court while the Penn-Central Merger is allowed to be consummated, EL would be placed in the intolerable position of facing alone the full impact of competition with the largest railroad merger in our history. Under such circumstances, as the Commission has found, it is doubtful that EL could survive.

3. Argument on the briefs below, the jurisdictional statements and any replies thereto filed before argument is warranted for the following reasons:

(a) Both the *Inclusion* case and the *Merger* case have been exhaustively and repeatedly briefed by all parties. The briefs to the court below were the successors to exhaustive briefs filed with the hearing officer and the Commission.

(b) N&W's jurisdictional statements and the offer to argue on the briefs below in its motion to advance make clear that appellants simply intend to repeat to this Court their arguments below. Thus, further briefing will not aid the Court in resolution of the merits.

(c) The decision of the court below is thorough and comprehensive, carefully setting forth and resolving the contentions of the parties.

4. Solely because of N&W's appeal in the *Inclusion* case, EL supports the appeal from the decision in the *Merger* case and, pursuant to Rule 10 of the Rules of the Supreme Court, asserts that a further question is presented in the *Merger* case (No. 778):

> Whether the district court erred in not requiring the commission to reserve jurisdiction to provide for a capital loss indemnity of EL by Penn-Central in the event that judicial review of the *Inclusion* case produces a downward revision of the terms for inclusion of EL in the N&W system because of the traffic consequences of the Penn-Central merger.

That question is a substantial one, as demonstrated by D&H's discussion of that issue in its Motion to Consolidate, etc., and EL hereby adopts D&H's discussion of that issue.

WHEREFORE, EL respectfully requests that the appeals in the *Inclusion* and *Merger* cases be consolidated and set down for immediate argument on the briefs below, the jurisdictional papers and briefs of appellees in response to the

jurisdictional papers, to be filed no later than one day before the date for oral argument.

November 6, 1967

Respectfully submitted,

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FILED
NOV 17 1967
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 830

OSCAR GRUSS & SON,

Appellant,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. .....

OSCAR GRUSS & SON,

Appellant,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant Oscar Gruss & Son (hereinafter called "Gruss") appeals from an order of a three-Judge United States District Court for the Southern District of New York entered on October 19, 1967, insofar as it dismisses the supplemental complaint of Gruss and denies the prayers thereof. The action was brought by Gruss to set aside, in part, orders of the Interstate Commerce Commission (the "Commission") authorizing the merger of The New York Central Railroad Company ("Central") into The Pennsylvania Railroad Company ("Penn") without requiring that The New York, New Haven and Hartford Railroad Company (the "New Haven") be included in the merged company ("Penn-Central") at the time of merger. Gruss submits this Jurisdictional Statement to show that

the Supreme Court of the United States has jurisdiction of this appeal, and that substantial questions are presented.

Opinions Below

The order appealed from is that of a statutory three-Judge Court (28 U. S. C. §§ 2284, 2325). The opinion of the Court is not yet reported. A printed copy thereof is attached as Appendix B to the Jurisdictional Statements in Nos. 778 and 779, which have been consolidated with the present case. A preliminary order was entered on June 21, 1967, without opinion, and is unreported. A copy is attached as Appendix A.

The orders appealed from were entered after a remand by this Court in No. 1060, October Term 1966, with an opinion dated May 9, 1967, reported in 386 U. S. 776. A prior opinion of the District Court therein considered is reported in 261 F. Supp. 386 (November 28, 1966).

The report of the Commission dated April 6, 1966, is reported in 327 I. C. C. 475. The Report of the Commission on Reconsideration dated September 16, 1966, is reported in 328 I. C. C. 304. The Supplemental Report of the Commission on Reconsideration and Further Hearing dated June 9, 1967, is reported in 330 I. C. C. 328. The orders of the Commission dated August 1, 1967, and September 12, 1967, unreported, are attached as Appendix 1 and Appendix 2, respectively, to the stay application of The Baltimore and Ohio Railroad Company, *et al.*, in No. 778.

Jurisdiction

The district court action was brought by Gruss under 28 U. S. C. §§ 1336, 1398, 2284 and 2321-2325, to enjoin, annul, or set aside orders of the Commission dated Septem-

ber 16, 1966, and June 9, 1967, insofar as they denied the relief sought by Gruss, and to require modification of the Commission order dated April 6, 1966. The New Haven First Mortgage 4% Bondholders Committee was permitted to intervene as a party plaintiff. The New Haven Trustees, Penn, and Central were permitted to intervene as parties defendant.

The final order of the district court was entered on October 19, 1967. Notice of appeal from that order to this Court was filed by Gruss in the United States District Court for the Southern District of New York on November 1, 1967.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U. S. C. §§ 1253 and 2101(b).

Jurisdiction is sustained by the decisions of this Court in *United States* v. *Drum,* 368 U. S. 370, 373 (1962), and *United States* v. *Georgia Public Service Commission,* 371 U. S. 285, 287 (1963).

The statutes involved in the case are:

28 U. S. C. (the "Judicial Code") §§1253, 1336, 1398, 2101(b), 2284, and 2321-2325.

§§5(1), 5(2) (a), (b), (c) and (d), and 5(9) of the Interstate Commerce Act (49 U. S. C. §§5(1), 5(2) (a), (b), (c) and (d), and 5 (9)).

§§5(b), 7(c), 8(b), and 10 of the Administrative Procedure Act (5 U. S. C. §§1004(b), 1006(c), 1007(b) and 1009).

§ 77(b), (c), (d), (e), and (f) of the Bankruptcy Act (11 U. S. C. § 205(b), (c), (d), (e), and (f)).

The texts of the provisions of the Judicial Code (except for §1398 thereof) and the Interstate Commerce Act are

printed in the Jurisdictional Statement in No. 778. The text of the provisions of 28 U. S. C. §1398 and of the Administrative Procedure Act and the Bankruptcy Act is attached as Appendix B hereto.

Questions Presented

The following questions are presented by this appeal:

1. Whether the District Court erred in authorizing the Interstate Commerce Commission to permit the consummation of the Penn-Central merger, prior to and without awaiting determination by the Commission of the proceedings for inclusion of the properties and operations of the New Haven Railroad in the merged company concurrently with consummation of the merger, and without a determination by the Commission of the ultimate fate of the New Haven.

2. Whether the District Court erred in failing to enjoin consummation of the Penn-Central merger unless and until the Commission requires the simultaneous inclusion of the operations of the New Haven on an interim basis, by lease or otherwise, until an ultimate determination of the New Haven reorganization proceedings.

3. Whether the District Court erred in not remanding the case to the Commission for further proceedings in conformity with the opinion of the Supreme Court of the United States in this matter, *Oscar Gruss & Son* v. *United States,* 376 U. S. 776.

Statement of the Case

This suit of Gruss is before the Court for the second time. It was brought on October 18, 1966, to enjoin con-

summation of the Penn-Central merger, and the Commission orders authorizing it, until provision is made for the actual inclusion of the New Haven.

The complaint was dismissed on the ground, based upon an erroneous reading of decisions of this Court, that Gruss had no standing to maintain it. *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386 (November 28, 1966).

That order was vacated by this Court, and the case remanded for further proceedings. *Oscar Gruss & Son* v. *United States,* 386 U. S. 776 (May 9, 1967).

Instead of remanding the case to the Commission for further proceedings, as requested by Gruss, the Court below ordered on June 21, 1967, that the complaint be dismissed, unless a supplemental complaint were filed on or before July 10, 1967. The supplemental complaint was accordingly filed.

Again the complaints were dismissed, by the order dated October 19, 1967. This time the Court below acknowledged the right of Gruss to be heard, but denied the prayer of Gruss for relief upon the ground that the Commission's indication of its intention of prescribing some form of financial aid that will permit the New Haven's operations to continue was enough to meet the Commission's statutory obligations.

In summary, the case of Gruss for injunctive relief and for reversal of the order below is based upon the following propositions:

1. Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), conditions the merger of two or more carriers upon a finding by the Commission that it "will be consistent with the public interest".

2. The Commission has found that the merger of Penn and Central would effectively destroy the ability of

the New Haven to survive and would not be in the public interest without complete inclusion of the New Haven.

3. There is and can be no assurance that the New Haven will ever be included in the merged Penn-Central, unless inclusion is required at the time of and as a condition precedent to consummation of the merger.

As shown below, the Commission has not yet determined the fate of the New Haven. Unless the Commission acts to require immediate inclusion of the New Haven at the time of and as a condition precedent to consummation of the Penn-Central merger, the New Haven will be forced out of business and into liquidation. The actual effect of the order below, permitting consummation of the Penn-Central merger without concurrent inclusion of the New Haven, is to sanction a transaction contrary to the public interest as found by the Commission, and in violation of Section 5(2) of the Interstate Commerce Act.

(a) The Merger Proceedings.

The merger sought to be enjoined was authorized by the Interstate Commerce Commission, purporting to act under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), by Report and Order dated April 6, 1966, *Pennsylvania Railroad Company—Merger—New York Central Railroad Company,* 327 I.C.C. 475, as modified by further Reports and Orders dated September 16, 1966 (328 I.C.C. 304), June 9, 1967 (330 I.C.C. 328), August 1, 1967, and September 12, 1967.

The merger was authorized by the Commission's order dated April 6, 1966, subject to the condition (Condition No. 8, in Appendix A to the Report) that the merged com-

pany include the properties and operations of the New Haven.

That condition is based upon findings of the Commission, pursuant to Section 5(2) of the Interstate Commerce Act, that the merger of Penn and Central:

(a) Would effectively destroy the ability of the New Haven to survive; and

(b) Would not be in the public interest without complete inclusion of the New Haven. 327 I. C. C. 475, 522, 524.

The New Haven is the subject of reorganization proceedings under Section 77 of the Bankruptcy Act instituted in 1961 and still pending in the United States District Court for the District of Connecticut (the "Reorganization Court"), Bankruptcy Docket No. 30226, and before the Commission, Finance Docket No. 21669.

The Reorganization Court has found that the New Haven "cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system." [1]

The condition adopted by the Commission, however, does not require inclusion of the New Haven simultaneously with or as a condition precedent to consummation of the merger, but merely requires a commitment that the merged company will include the New Haven at some indefinite time in the future. 327 I.C.C. at 553.

It is our contention, as argued below, that the condition imposed by the Commission will not achieve the inclusion

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[1] Partial Ruling dated July 11, 1967, on a petition of the New Haven Trustees for instructions, a copy of which is annexed to Gruss' Application for Stay as Appendix A.

of the New Haven in the merged company ("Penn-Central"), but will, on the contrary, result in the liquidation of the New Haven. The actual effect of permitting consummation of the Penn-Central merger without concurrent inclusion of the New Haven is to sanction a transaction contrary to the public interest as found by the Commission, and in violation of Section 5(2) of the Interstate Commerce Act. The injunction denied by the order appealed from is necessary to prevent such statutory violation and to achieve the merger on terms which will be in accord with the statutory mandate.

The New Haven Trustees intervened early in the merger proceedings to seek inclusion of the New Haven in the merged Penn-Central simultaneously with and as a condition precedent to consummation.

After the close of the hearings, the New Haven Trustees abandoned that position on the basis of a private arrangement, disclosed months later, with Penn and Central. That arrangement was embodied in an agreement dated April 21, 1966, for the sale of the New Haven properties to Penn-Central, free of the bondholders' liens and without assent of the bondholders (the "Sale Proposal"), at a price that would wipe out most of the equities of the bondholders. The Sale Proposal includes a commitment of the New Haven Trustees to Penn and Central not to make or file with the Commission in the Penn-Central merger proceedings, or any judicial review thereof, any statement, stipulation, or other document inconsistent with the provisions and intent of the Sale Proposal. It also commits the New Haven Trustees to use their best efforts to effect consummation of the transactions contemplated thereby.[2] It has effectively

[2] These provisions of the Sale Proposal are set forth in Appendix B to Gruss' Application for Stay.

precluded the New Haven Trustees from representing the interest of the estate in having the Commission require simultaneous inclusion.

On July 11, 1966, in view of the change of position by the New Haven Trustees, Gruss petitioned for leave to intervene in the merger proceedings and for reconsideration of the inclusion condition, its modification to require inclusion of the New Haven simultaneously with and as a condition precedent to the merger, and an opportunity to be heard thereon.

Gruss, with its partners and affiliates, holds approximately 14% of the defaulted First and Refunding Mortgage 4% Bonds ("first mortgage bonds") of the New Haven. The claims of Gruss amount to approximately $10½ million principal and $2½ million interest.[3] Gruss had been and has continued to be an active participant in the New Haven reorganization proceedings.

The Commission permitted Gruss to intervene, but denied his petition for reconsideration, modification, and a hearing, by its order dated September 16, 1966.

Gruss then brought this action to enjoin, annul or set aside the second Commission order, insofar as it denied the relief sought by Gruss, to require a modification of the first Commission order, and to require the Commission to hold the requested hearings. The court below entered summary judgment dismissing the complaint, 261 F. Supp. 386 (S. D. N. Y. 1966).

Gruss appealed to this Court. Motions to affirm were filed by the defendants, by Penn and Central, and by the New Haven Trustees. This Court vacated the order below

[3] There are $76,819,900 principal amount of the first mortgage bonds outstanding, having a claim (with interest in default) of over $98 million.

and remanded the case with costs to Gruss, citing *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, and noting that the Commission order attacked by Gruss was then subject to further consideration by the Commission, and that proceedings to achieve inclusion of the New Haven were also under way before the Commission. *Oscar Gruss & Son* v. *United States,* 386 U. S. 776, 777.

When the District Court received the mandate of this Court, plaintiff submitted a proposed order remanding the matter to the Commission for further consideration.[4] The District Court, however, entered an order submitted by the United States Attorney for the Southern District of New York providing that the action would be dismissed unless Gruss filed a supplemental complaint, which Gruss accordingly did on July 10, 1967. One of the questions presented by this appeal is whether the District Court erred in failing to remand the case to the Commission, which had to that point denied Gruss a hearing on the merits, and continues to do so by *ex parte* adverse rulings. See Point II, *infra.*

The Commission held further hearings on the Appendix G conditions for other railroads, but none prior to June 1967 on the Appendix A condition relating to the New Haven. The Commission's order dated June 9, 1967, modified the Appendix G conditions, and again ordered consummation of the merger, without hearing Gruss or considering the Gruss petitions,[5] despite this Court's May 8 opinion remanding the case on the appeal taken by Gruss.

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[4] A copy of the proposed order is annexed hereto as Appendix C.

[5] The Commission's supplemental report dated June 9, 1967, states, contrary to fact, that Gruss was among the "parties whose views were expressed." 330 I.C.C. at 330.

In the supplemental complaint, Gruss prayed that the court enjoin, annul or set aside the orders of the Commission dated September 16, 1966, and June 9, 1967, insofar as they authorized consummation of the merger without the simultaneous inclusion of the properties and operations of the New Haven, and (as in the original complaint) that the court direct the Commission to require inclusion of the New Haven properties and operations concurrently with the Penn-Central merger, and to hold further hearings, postponing consummation of the merger to permit completion of the hearings and inclusion of the New Haven.

In the order appealed from, the District Court dismissed the complaints without prejudice to Gruss' right to appeal from further Commission orders. We show below that if the merger is permitted to go forward, without concurrent inclusion, future appeals will be futile.

(b) Proceedings Pending for Interim Relief to the New Haven.

In April 1967 the New Haven Trustees filed with the Reorganization Court a petition for instructions. The answer filed by Gruss[6] requested that the New Haven Trustees be instructed to use their best efforts (a) to see that the operations of the New Haven are included with those of Penn and Central at the time of and as a condition precedent to the Penn-Central merger, and (b) to see that, upon any sale of properties of the New Haven to Penn-Central, the price and terms be as favorable as possible to the New Haven estate and its creditors. It also requested that the New Haven Trustees be directed to act on behalf of the estate, free of the conflicting obligations to Penn and Central which they had assumed.[7]

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[6] A copy of the answer is annexed hereto as Appendix D.

[7] The conflict of interest arises from the contract provisions set forth in Appendix B to Gruss' Application for Stay.

On July 11, 1967, the Reorganization Court issued a Partial Ruling on the petition for instructions,[8] finding that the New Haven "cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system. The court is therefore strongly of the opinion that the Interstate Commerce Commission should be asked to order inclusion as soon as the merger takes place."

The Reorganization Court noted that the undertakings of the New Haven Trustees to Penn and Central disabled the Trustees from asking the Commission to order immediate inclusion. The court did not direct them to seek immediate inclusion themselves, but said that "the Trustees should not oppose the immediate inclusion request by other parties in interest".

The Commission then recognized, for the first time, the need for modifying its prior orders in order actually to effect inclusion of the New Haven in the merged Penn-Central. By Order dated August 1 and served on August 3, 1967, the Commission directed Penn, Central, and the New Haven Trustees to file within 30 days a proposed lease, or their respective proposals for a lease, of the New Haven properties to the merged Penn-Central, described in the order as "steps for the immediate inclusion of the New Haven into Penn-Central by lease."

Penn, Central, and the New Haven Trustees failed and refused to comply with that order of the Commission. Instead of filing lease proposals, they filed proposals for loans up to $25 million by Penn-Central to the New Haven Trustees over a period of three years after the merger, against Trustees' certificates to be secured by a lien prior to the liens of the New Haven mortgage bonds.

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[8] See Appendix A to Gruss' Application for Stay.

Those filings were made on September 1, 1967. On September 12, 1967, the Commission issued another order modifying the August 1 order, and providing for hearings on "the most suitable means for continuing the New Haven operations" and "equitable terms for the means adopted." Without hearing the parties or purporting to determine those issues, the September 12 order states that "consummation of the Penn-Central merger should proceed pending such determination".

Those hearings were held, and argument was heard by the Commission, during the proceedings in the court below. The loan proposals were opposed, and immediate inclusion of the New Haven in the merged Penn-Central by lease or otherwise was supported, by Gruss, and by all other representatives of New Haven bondholders who appeared. Despite the admonition of the Reorganization Court that the New Haven Trustees "should not oppose the immediate inclusion request by other parties in interest", they instead sought Commission approval of a loan to keep the New Haven running, and the equity of bondholders dwindling, without immediate inclusion.[9]

The matter is still pending before the Commission, undecided, as this Jurisdictional Statement is written.

(c) New Haven Reorganization Proceedings.

While this matter was pending under the original complaint the Trustees filed with the Commission, in Finance Docket No. 21669, a purported Plan of Reorganization of the New Haven based on the Sale Proposal. The terms

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[9] Compliance by the New Haven Trustees with the July 11 instructions of the Reorganization Court and the August 1 order of the Commission might have conflicted with their commitment to Penn and Central not to make any statement, or file any document, inconsistent with the "provisions and intent" of the Sale Proposal.

of the proposed sale are discussed below. The purported Plan of Reorganization contained no provisions indicating what the present security holders of the New Haven would receive, and provided that the sale, free of mortgage liens, be consummated without any vote of bondholders. Gruss applied to the Commission for an order directing the New Haven Trustees to file a complete plan in conformity with the standards of Section 77(b) of the Bankruptcy Act, but the Commission took no action with respect to plaintiff's application.

Gruss and the intervening plaintiff in this matter, and the Trustee for a junior bond issue, had appealed from an order of the Reorganization Court which authorized the Trustees to file their purported plan with the Commission, and contained language which could be construed as approval thereof. Shortly after the decision of this Court (386 U.S. 776) vacating the November 23, 1966 order of the court below and remanding the case, the United States Court of Appeals for the Second Circuit modified the order of the Reorganization Court to eliminate the findings to which the appellants had objected, with an opinion suggesting that the New Haven Trustees should prepare "a more nearly conventional plan of reorganization for the New Haven." *Chase Manhattan Bank* v. *Smith*, 387 F. 2d 635 (May 29, 1967). Three months later, on September 1, 1967, the New Haven Trustees amended their plan to set forth their proposed treatment of the several classes of New Haven security holders. The Commission has scheduled hearings thereon to commence on November 29, 1967.

The New Haven Trustees propose to issue nothing but common stock and warrants of the reorganized New Haven to the first mortgage bondholders. Prior claims, mostly liabilities incurred during the Trustees' administration of the estate, would be met by issuing $65,956,000 of debt

securities as of August 31, 1967, with additional debt securities required as their loss operations continue to deplete the equity of bondholders. The consideration to be received by the New Haven under the Sale Proposal embodied in the New Haven Trustees' Plan consists principally of 950,000 shares of common stock of Penn and $32,000,000 principal amount of 5% bonds of that company, all having a present market value substantially under $90,000,000.[10] It thus appears that any remaining value to the claim of the first mortgage bondholders based on the Sale Proposal is a small fraction of their $98,000,000 claim.

In contrast to the pittance that the first mortgage bondholders would get under the New Haven Trustees' Plan, the evidence shows, we contend, that the New Haven is worth vastly in excess of the amount provided for the estate in the Sale Proposal. In particular, the New Haven has substantial interests in the Grand Central Terminal properties in New York City which would be wiped out under the Sale Proposal, and for which admittedly the New Haven would get nothing.

The New Haven Trustees, abiding by their commitments to Penn and Central, are resisting the efforts of bondholders to improve the price. They seek to justify it by attributing fantastic values, between 50% and 250% higher than present market values, to the common stock of Penn.

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[10] $8,000,000 of cash included in the price, the retained assets of the New Haven, and approximately $8,000,000 deposited with the Reorganization Court or held in escrow as a result of sales of properties subject to the first mortgage will be consumed (except for approximately $400,000 as of August 31, 1967) in adjustments and payment of current liabilities. Another $5,000,000 would come in ahead of bondholders if six-months claimants establish their claims to priority.

The Questions Presented Are Substantial

The questions presented by this appeal are substantial and require plenary consideration for their resolution.

The important questions arise because of the unseemly anxiety of the Commission and the Court below to hasten the merger even at the expense of denying a timely hearing to bondholders who had been deprived of effective representation by their proper spokesmen, the New Haven Trustees, through a disqualifying contract.

In that haste, the Commission and the court below have treated as certain to be done that which may never be done —inclusion of the New Haven in Penn-Central. One result of their orders, if not reversed herein, would be to make it highly unlikely that it will ever be done. In the meantime, the losses of the New Haven at the expense of the bondholders, continued and enhanced by the postponement of its inclusion in Penn-Central, represent an unconstitutional deprivation of the property of the bondholders, as the Reorganization Court has repeatedly recognized (Appendix C to Gruss' Application for Stay).

Summary of Argument

The New Haven is not capable of surviving a merger of Penn and Central that fails to include the New Haven at the time of merger. On July 11, 1967, the Reorganization Court found that immediate inclusion of the New Haven in the Penn-Central merger is essential, in order to prevent a shutdown of railroad operations, and that the Commission should be asked to order inclusion of the New Haven, as soon as the merger takes place.

This the Commission has been asked to do. In the proceedings pending before the Commission initiated by its orders dated August 1 and September 12, 1967, the Commission could decide, if the merger will not already

have taken place, that the New Haven must be included simultaneously with consummation of the merger. We submit that if, and only if, the decision to require inclusion of the New Haven simultaneously with and as a condition precedent to the merger is made before consummation of the merger will it be realistic to expect that the New Haven will ever be included in the merged company.

No order entered after consummation of the merger can actually achieve either inclusion of the New Haven in the merged Penn-Central, or the survival of the New Haven as an operating railroad. Prompt action by Penn and Central can actually be compelled in only one way—by requiring it as a condition precedent to a transaction that they wish to consummate promptly.

The merger itself does nothing to save the New Haven—quite the contrary. If the Commission were to approve loans by Penn-Central to the New Haven in lieu of immediate inclusion of the properties and operations of the New Haven in the merged Penn-Central, as requested by Penn, Central, and the New Haven Trustees, the order would not be capable of keeping the New Haven alive. The proposals involve borrowing up to $25 million on Trustees' certificates that would have claims prior to those of bondholders. Penn and Central propose to do nothing for the New Haven in the next several years except to loan money against a prior lien, to produce more losses, so that Penn and Central would be repaid at the expense of bondholders.[11] The borrowings could not be consummated without approval of the Reorganization Court and would necessarily be resisted there, and in the appellate courts if necessary, by bondholders threatened with obliteration of their equities.

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[11] Central has been and is worsening the cash shortage of the New Haven by withholding (on a specious claim of its right to do so) Grand Central Terminal rentals, amounting to over $1,500,000 at December 31, 1966, which the New Haven Trustees report as income but do not receive.

POINT I

The District Court erred in failing to enjoin consummation of the Penn-Central merger unless and until the Commission requires simultaneous inclusion of the operations of the New Haven on an interim basis, by lease or otherwise, pending an ultimate determination of the New Haven reorganization proceedings.

This case is governed by the Transportation Act of 1940, amending the Interstate Commerce Act, and particularly by Section 5 of the Interstate Commerce Act as so amended, 49 U. S. C. Section 5.

Under the Interstate Commerce Act, as amended by the Transportation Act of 1940, the Commission has no power to compel mergers and consolidations. *St. Joe Paper Co.* v. *Atlantic Coastline R.R.*, 347 U. S. 298, 305 (1954). The Commission does have the power to approve or disapprove such transactions as are proposed by carriers, and to impose terms and conditions to its approval thereof. Under both the majority and minority opinions of the Court in *St. Joe*, the "carrier" means the debtor or (if it is bankrupt) its trustees and creditors, not the trustees alone.

Section 5(2) (b) permits the Commission to enter an order approving and authorizing a merger, if the Commission finds that, subject to such terms and conditions as it shall find to be just and reasonable, the proposed transaction will be consistent with the public interest.

Under subdivision (c) of Section 5(2), the Commission is directed to give weight to "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction".

Subdivision (d) gives the Commission authority to require the inclusion of another railroad in the territory in-

volved upon equitable terms, upon petition by the railroad requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

Thus, the Commission is permitted to approve a proposed merger if and only if it will be consistent with the public interest. What the Commission had authority to do in connection with the proposed merger of Penn and Central, and the New Haven's petition for inclusion in the merged Penn-Central, was limited by its findings of what the public interest requires.

The Commission, in its Report and Order dated April 6, 1966, found that:

> (a) *The merger of Penn and Central would not be in the public interest without complete inclusion of the New Haven.* (Emphasis supplied) 327 I. C. C. at 524.
>
> (b) The merger of Penn and Central would effectively destroy the ability of the New Haven to survive. 327 I. C. C. at 522.
>
> (c) Inclusion of the New Haven's freight and passenger operations in the merger will be consistent with the public interest. 327 I. C. C. at 526-7.

Under Section 5(2) of the Interstate Commerce Act, in view of finding (a) above, there is no statutory basis for consummation of the merger of Penn and Central without inclusion of the New Haven.

Yet, on the basis of the Commission's decisions to this date, no one can know whether the New Haven will ever be included in the merged Penn-Central. The only condition relating to inclusion of the New Haven that the Commission has thus far imposed contemplates waiting for inclusion until after the termination of the pending proceedings for

the reorganization of the New Haven, estimated on the record as approximately three years from now.

The failure of the Commission and the court below to distinguish between (a) actual inclusion of the New Haven and (b) a commitment, that may never be capable of performance, to include the New Haven some day has resulted in the anomaly that the New Haven is the only road directly threatened by the merger for which the Commission has not provided Appendix G diversion-of-traffic conditions of the type considered by this Court in *Baltimore & Ohio R. Co. v. United States,* 386 U.S. 372 (1967). (See 327 I.C.C. 475, at 561.)

Yet of all the railroads affected by the Penn-Central merger, in fact and on the findings of the Commission itself, the New Haven is most in need of protection. Its very life depends upon the traffic it handles between the terminals of Penn in the New York metropolitan area and the New Haven terminals in Boston. The proposed merger will join Penn with Central, the New Haven's principal competitor for such traffic between New York and Boston.[12]

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[12] The District Court used a remarkable piece of conjecture to pass by this matter involving acute problems of statutory standards and constitutional protection against confiscation. In its opinion on Gruss' first complaint, 261 F. Supp. 386, 389 (1966) the Court reasoned that the New Haven did not need protective and financial conditions against the impact of the huge merger because Penn-Central would not divert traffic to hurt its future division, "breaking the historic bonds between Pennsylvania Railroad and New Haven forged by geography and welded by millions of dollars of expenditures, only to renew them again some time hence." It repeated this view in the opinion under review (Appendix B to Jurisdictional Statement in No. 778, p. B-29). But this conjecture misses the real issue. Penn-Central would not break the present physical interconnections with the Pennsylvania Railroad by which the New Haven gets traffic, yet it would have every incentive to increase the New Haven's deficit during the period of limbo, by diverting traffic carload by carload to New York Central-Boston & Albany. It would be protected from the consequences by the adjustment provisions of the Sale Proposal and the

The Reorganization Court has found that the New Haven "cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system." (Appendix A to Gruss' Application for Stay.)

Instead of filing proposals for immediate inclusion of the New Haven by lease, Penn and Central and the New Haven Trustees propose to keep the New Haven running in this impossible competitive situation after the merger, with the bondholders bearing the losses, but with borrowings to cover the cash drain.

In the August 1 order, the Commission described what it was then requiring as "steps for immediate inclusion of the New Haven into Penn-Central by lease." In the joint brief of the Commission and the United States in the court below, that court was advised that the Commission's order had actually "set in motion machinery designed to produce operation of N H by the merged company at the time of consummation". However, on September 1, 1967, Penn, Central, and the New Haven Trustees threw a monkey wrench into the machinery by proposing loans instead of immediate inclusion.

It was and is the position of Gruss that only immediate inclusion by a lease or otherwise, required as a condition

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proposed loan proposals. Thus, the assumption underlying Judge Friendly's opinion is without factual basis. It is not at all "unrealistic" to suppose that Penn-Central would suspend existing traffic patterns, if it were in a position to profit by diverting the profitable traffic to itself while the New Haven bondholders bear the added losses. To match conjecture with conjecture, such diversion may be taking place today between the merger partners at the expense of the New Haven and may be one reason for the enormous deficits being incurred by the New Haven Trustees. Diversion can take place without overt understanding, simply by Penn reducing its aggressiveness in soliciting shippers' business. Since the exchange ratio between Penn and Central on the merger is fixed, it makes no difference to them which merger partner carries traffic and shows profits before the merger is consummated, so long as the aggregate profit is maximized at the expense of the New Haven.

precedent to the merger, would preserve the operations of the New Haven. Commission approval of the loan proposals would not be enough to authorize the borrowing against proposed Trustees' certificates, and would actually result in a liquidation of the New Haven instead of its inclusion in the merger.

The matter is still pending before the Commission as this Jurisdictional Statement is written.

The decision can determine the fate of the New Haven if and only if it requires Penn-Central to take over the New Haven operations as a condition precedent to consummation of the merger. Commission approval of a loan arrangement might appear to determine the matter, but cannot do so in fact. The Commission has no power to compel a bankrupt railroad to borrow money, or to issue Trustees' certificates having a lien prior to that of the mortgage bonds.

Any such borrowing would be governed by Section 77 of the Bankruptcy Act, 49 U. S. C. 205, and would have to be approved by the Reorganization Court. Any such proposed borrowing will be resisted by bondholders.

The New Haven Trustees have attempted to portray the problem as merely one of cash stringency which the New Haven Trustees did manage to avoid until this year, and which could be cured by a loan. The argument is fallacious. The New Haven Trustees have managed cash by borrowing, by defaulting on fixed charges, and by deferring taxes, car rentals, and other administration claims. They have proposed to fund their already accumulated debts by issuing debt securities ahead of the first mortgage bondholders (*supra* pp. 14-15). These prior claims have eaten away most of the first mortgage bondholders' property during the New

Haven Trustees' management. Continuation of this destruction of bondholders' property by more borrowing to finance more loss operations might destroy the first mortgage bondholders entirely. *Such borrowing is not immediate inclusion.* Advocacy of this additional disaster to the first mortgage bondholders by the New Haven Trustees is in violation of Judge Anderson's instructions to the Trustees not to oppose immediate inclusion (Appendix A to Gruss' Application for Stay). Gruss would be forced to resist any application of the New Haven Trustees to the Reorganization Court to issue Trustees' certificates for any such loan, and he would press for approval of the pending petition of the Committee for an immediate order for abandonment of the New Haven's operations.

The United States Court of Appeals for the Second Circuit has held that bondholders with a substantial equity, such as the first mortgage bondholders of the New Haven, are entitled to a hearing on petitions for abandonment, where operations involve losses, before debt securities may properly be extended. *Bankers Trust Company* v. *Gebhart,* 195 F.2d 238 (1952). That case would apply *a fortiori* to the proposed issue of securities having priority over the bonds, which is the basis for Penn's and Central's and the New Haven Trustees' proposals for loans now pending.

In *In re Third Ave. Transit Corp.,* 198 F. 2d 703, 707 (1952), the same Court adverted to these limitations, stating:

> "As the debtor is a public utility, the judge properly took into account the factor of the public interest in the debtor's continued operations. That, however, is but one factor; it must not be allowed to outweigh all others. There are strict limits to the extent to which, in reorganization proceedings, the interests of creditors (or of a particular class of creditors) may be

sacrificed to the public interest; to exceed those limits is (to say the least) to come dangerously close to the edge of unconstitutional taking of property, a line from which courts should keep away if possible. The reorganization judge should not compel a marked sacrifice of that kind, without first deciding, on substantial evidence, whether the interest of the creditors who would be affected by the sacrifice does not demand that prompt steps be taken to bring about abandonment of the utility's operations, including steps to procure the consent of those public authorities (if any) whose consent to abandonment is required."

This Court has affirmed the constitutional right of a railroad company to discontinue operations where continued operations cannot yield a fair return. In *Railroad Commission of Texas* v. *Eastern Texas R. Co.*, 264 U. S. 79, 85 (1924), the Court said:

"The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return. And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law."

See also *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana,* 251 U. S. 396, 399 (1920); *Bullock* v. *Railroad Commission of Florida,* 254 U. S. 513, 520-1 (1921).

The Reorganization Court has several times recognized the application of these cases to this set of facts. (See Appendix C to Gruss' Application for Stay.) "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589 (1935). The public interest in continued operation of the New Haven cannot override the constitutional rights of first mortgage bondholders.

Gruss is not seeking to block the Penn-Central merger. While Gruss believes that bondholders would fare better by a liquidation of the New Haven,[13] Gruss has made clear that he would go along with inclusion of the New Haven in Penn-Central if—but only if—the New Haven's losses are stopped by immediate inclusion in Penn-Central through lease or conveyance. Gruss will then take his chances on the subsequent proceedings for determination of the fair consideration for the New Haven properties to be paid by Penn-Central, through the constitutional processes of the Commission and the courts.

Gruss's insistence on immediate inclusion is no technical detail, and no minor point. The New Haven has been running at a loss for six years under the Trustees' management, and no one has thought that its results could be changed. The situation clearly has required liquidation unless the New Haven could be absorbed by a larger road—specifically, Penn-Central. According to Penn, Central, and the New Haven Trustees, integration of the New Haven's operations

[13] Operations which public authorities desire to continue could be sold to them.

with those of Penn and Central will save approximately $5 million per year. See the Commission's reference to those savings, 327 I.C.C. at 526, note 11.

The bondholders have been immolated for years on the altar of the public interest, in maintaining the New Haven to serve New England, while awaiting this merger, but while administration claims from loss operations have piled up ahead of their rights. Simultaneously with its order of April 6, 1966, approving the merger on the condition that Penn-Central take over the New Haven, 327 I.C.C. 475, the Commission denied an application to terminate the New Haven's heavily losing interstate passenger service. *New York, N. H. & H. R. Co., Discontinuance of Trains,* 327 I.C.C. 151 (April 5, 1966).[14] While the Reorganization Court has repeatedly recognized that loss operations at the expense of the First Mortgage Bondholders could not constitutionally be continued,[15] it has deferred consideration of the pending petition for liquidation of the New Haven in the hope that inclusion in Penn-Central will sometime occur.

If the losses are not stopped by immediate inclusion, they must go on for years. This Court's decision in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (March 27, 1967) threw off the hoped-for time schedule, as did also the Second Circuit's clear intimation that the Trustees' fragmentary "Plan" to sell the New Haven's assets to Penn-Central could not be put over without a vote of the New Haven's creditors and with no intimation as to what the creditors would receive in exchange. *Chase Manhattan Bank* v. *Smith,* 378 F. 2d 635 (May 29, 1967). With several years' delay still in prospect, Penn and Central con-

[14] The Commission there stated that there was "totally lacking any hope or plan for survival of this carrier, except that held out by its merger with a trunkline railroad." 327 I.C.C. 151, 173.

[15] See Appendix C to Gruss' Application for Stay.

tinue to argue before the Commission that all details of the takeover must be concluded before inclusion of the New Haven in Penn-Central—i.e., final determination of the price, and voting on and confirmation of the New Haven Plan of Reorganization. In the meantime. they argue that they need not take over the New Haven by lease, conveyance, or otherwise, unnecessary losses amounting to $5 million per year should continued to be incurred, and the bondholders should continue to bear the losses in the public interest. All that they propose to do is to supply the New Haven Trustees with cash which, after it is lost in operations, must be repaid out of the present residual equity of the bondholders.

The Commission, by the procedural positions taken as detailed on pages 9-10 and 34-36, seemed determined not to grant bondholders a hearing on the issue of immediate inclusion after the Reorganization Trustees contracted away their own right to maintain that issue. But the disrupted time schedule, the New Haven's exhaustion of cash, and Judge Anderson's order of July 11, 1967, have now finally presented the issue to it (pages 12-13 and 36).

It is no answer to the problem to say, as the District Court did (Appendix B to Jurisdictional Statement in No. 778, pp. B-28-30) that Gruss can seek review of the Commission's orders on matters now pending before it. If the stay of the merger is once lifted, it will be too late.

Penn and Central have made clear that they do not want the New Haven and would be happy to see it die. If they are permitted to merge before the ultimate fate of the New Haven is determined (in violation of the holding of this Court in *Baltimore and Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967)), they can litigate without end the terms of inclusion. The New Haven cannot continue to

bear its operating losses. It has been running at a loss in reorganization for six years. It will collapse and never be included unless immediate inclusion is ordered. The statutory basis for permitting the merger would have failed, and the first mortgage bondholders would have been deprived unconstitutionally of their property without just compensation, by forced operation with continued and irremediable losses.

The Commission, Penn and Central, and the New Haven Trustees are thus faced with a dilemma. The Commission did not find the merger in compliance with the standards of the Interstate Commerce Act except on the assumption that the merged road would save the New Haven for the benefit of the public. If it were certain that the New Haven will sometime be included in Penn-Central, then there would be no excuse for not requiring Penn-Central to take it over immediately upon consummation of the merger. If Penn and Central are permitted to merge with the purchase price of the New Haven unsettled, there is no reason why they should not take over the operations of the New Haven on the same basis. *If Penn-Central gets the full benefit of the inclusion of New Haven forthwith, including the potential savings, there can be no valid reason for delay.*

On the other hand, if it is possible that the New Haven may never be included, the merger entirely lacks an adequate statutory basis of finding of public interest under Section 5 of the Interstate Commerce Act. If the difficulties of determining the price to be paid for the New Haven's assets, and the question of bondholders' votes, justify Penn and Central in a present hands-off policy on the theory that inclusion may never be completed, the merger simply cannot be supported under the statutory standards.

Not the least of the Commission's and Penn's and Central's difficulties in the face of bondholder opposition is *St. Joe Paper Co.* v. *Atlantic Coast Line R. R.*, 347 U. S. 298 (1954). There a majority of four members of this Court held that the Commission could not force a railroad to merge into another without its consent, and a minority of three suggested that this could be done with the vote of the requisite percentage of security holders entitled to vote in a reorganization. Certainly the present reorganization can never command the consent of bondholders, if the Commission accepts Penn's and Central's and the New Haven Trustees' view that the bondholders must continue to have their rights destroyed by loss operations for several more years in the name of public interest.

There are in addition serious questions as to fairness and feasibility of the Plan of Reorganization. We do not, of course, expect this Court to consider these problems at this time, but we point out that they exist. It is our contention that the consideration is grossly inadequate. Moreover, on the basis of current market prices of the Penn stock, the Reorganized Company will be barely solvent from its inception, and the Trustees are therefore forced to estimate that at time of consummation the market price of Penn stock will be more than $30 per share higher than the present market, and substantially higher than any value it has attained during the past ten years or more. Still more optimistic valuations are necessary to justify the allocations of securities between classes of bondholders.

Again, the Plan is predicated on the assumption that the consideration received will be retained, pending achievement of these optimistic values, in a non-diversified investment company registered under the Investment Company Act of 1940, 15 U. S. C. §§80a et seq. To achieve registration, the Plan assumes that the Securities and Exchange

Commission will permit departures from the standards of that Act,[16] an assumption which is not self-evidently correct for a non-diversified company top-heavy with seven-year debt, with assets concentrated in a declining industry, with a relatively thin equity below the debt, and with speculative warrants diluting the common stock.

Finally, the fate of the New Haven remains undecided because the road cannot survive without immediate inclusion, and its collapse will destroy the statutory basis of public interest in the merger.

Under the Sale Proposal Penn and Central expected to bear New Haven's losses beginning about January 1, 1968, on the assumption that inclusion would be complete by that date. Our proposal is to have inclusion consummated on the date of the merger. Either conveyance or lease would put Penn-Central in possession of the railroad at that date, with power to institute operating economies and to adjust operations and routings. The fact that consolidation of operations might destroy the operating integrity of the New Haven is of no importance, for the New Haven cannot possibly survive as an operating railroad alone, and would have to be liquidated if for any reason final closing of the sale of its properties never occurs.

Under those circumstances, it will be equitable to require Penn-Central to bear any losses of New Haven from the date of the merger. We have no doubt that a lease to this effect could be speedily drafted if the parties willed it. Financial arrangements of equal magnitude have been

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[16] Among the difficulties which the Reorganized Company would encounter are the following provisions of Section 18 (15 U. S. C. 80a-18): (i) the provisions of clause (a)(1)(A) requiring 300% asset coverage for debt securities; (ii) the prohibition in clause (c) against more than one class of debt security; and (iii) the prohibition in clause (d) against issuance of warrants with a duration of more than 120 days.

undertaken under emergency pressures using letters of intent for transactions with unknowns far more difficult to define than those here involved.

Both Gruss and Manufacturers Hanover Trust Company, indenture trustee for the first mortgage bonds, have submitted to the Commission outlines of the terms of a lease. Gruss' proposal provides in substance that the rent shall be nominal, and Gruss makes clear that Penn-Central is free to put in operating economies forthwith, to abandon operations (subject, of course, to necessary public authorizations), to sell assets, etc.

If Gruss has made technical errors, counsel for the New Haven Trustees and for Penn and Central have the competence to correct them.

Since the purpose of this lease is merely to maintain the status quo pending completion of the New Haven reorganization, we are satisfied that it does not require a vote of creditors of the New Haven. Such a lease would (a) protect the public interest by keeping the New Haven running until completion of reorganization (b) without destroying the equity of the bondholders by continued losses. No program other than immediate inclusion by lease or conveyance will do so. Above all, authorization of the merger will not do so unless accompanied by a requirement of immediate inclusion as a condition precedent.

If the New Haven were ready for immediate closing of an agreement with Penn-Central, Penn-Central would have to take the New Haven's losses immediately. The fact that closing is delayed by the New Haven's reorganization proceedings, which are themselves delayed by the tactics described on pages 13-14 hereof and by the fact that Penn-Central has offered an unfair and inadequate price for the New Haven, should not change matters. This Court should

direct immediate inclusion of the New Haven in Penn-Central at the merger date, or should direct that the merger be enjoined until the Commission decides that issue in the proceedings now before it and until review of the Commission's decision.

POINT II

The District Court erred in not remanding the case to the Commission for an orderly hearing on Gruss' application for immediate inclusion of the New Haven in Penn-Central, following remand by this Court on May 9, 1967.

The law has seen no more dismal demonstration than this case of the old copybook maxim: "Haste makes waste." Every effort was made to deny bondholders a hearing on immediate inclusion, and now the hearing is still going on while this case is before this Court. By authorizing immediate consummation of the merger while the Commission is still pondering the issue of immediate inclusion, the District Court and the Commission have denied to Gruss the orderly procedure contemplated by Sections 5(b) and 8(b) of the Administrative Procedure Act, 5 U.S.C. §§1004(b), 1007(b) (Appendix B hereto).

The problem started when the New Haven Trustees intervened in the Penn-Central merger proceedings and properly requested immediate inclusion of the New Haven in the proposed merger. At this point, no New Haven bondholder had any occasion to seek to argue the point himself. But in December 1964 the New Haven Trustees reached an understanding with Penn and Central. The understanding was not reported until four months later, April 7, 1965, and was formalized a year later in the Sale Proposal dated

April 21, 1966. There were no hearings on the 1965 report, which stated that a definitive agreement would be prepared "as promptly as possible" and submitted to the Reorganization Court for appropriate action "upon its completion." No hearings on the Sale Proposal were held until October 1966.

In the Sale Proposal, the New Haven Trustees agree to limit the documents to be filed by them in the Penn-Central merger proceedings before the Commission, or in any judicial review thereof, thus abandoning their position that inclusion of the New Haven's operations should be required by the Commission as a condition precedent to consummation of the Penn-Central merger. (See Appendix A to Gruss' Application for Stay.)

In the Sale Proposal, the New Haven Trustees commit themselves to Penn and Central to use their best efforts, as Trustees, to effect consummation of the transactions contemplated thereby. (See Appendix A to Gruss' Application for Stay.)

Thus by April 27, 1966, when the April 6 Report and Order were served, the New Haven Trustees had disabled themselves from maintaining their previous position before the Commission, and in effect had left the first mortgage bondholders without representation in the Penn-Central merger proceedings. Even worse, they had committed themselves to Penn and Central to oppose any efforts of first mortgage bondholders (a) to secure protection for the New Haven from the adverse effects of the Penn-Central merger, by simultaneous inclusion or otherwise, or (b) to improve, from the standpoint of the New Haven, the terms of inclusion.

In view of the New Haven Trustees' change of position, on July 11, 1966, the Gruss petitions were filed. The peti-

tions pray for the entry of an order by the Commission reconsidering and modifying said Condition No. 8 to require inclusion of the New Haven at the time of and as a condition precedent to the merger of the Pennsylvania and the Central, holding further hearings, and postponing consummation of the merger to permit the completion of such hearings, and such inclusion of the New Haven.

The petitions took the same position that the New Haven Trustees had taken before they contracted away their right to maintain the position. The New Haven Trustees did an about face and now opposed this position, as did Penn and Central. The Commission, despite the clear situation by which the bondholders were denied representation, denied the petitions.

Gruss' original complaint in the district court met the opposition of the Commission and the United States and of Penn and Central on the ground that Gruss had no standing to sue, and that only the New Haven Trustees could act. While we submit that the Trustees' disqualification was patent, the District Court brushed aside Gruss' argument to that effect on the ground that only the Reorganization Court could so find. *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386 (1966). This Court vacated the district court order of dismissal, 386 U. S. 776 (May 9, 1967), for the reason that the merger matter, including the question of inclusion of New Haven, was again pending before the Commission following the remand in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967).

We think it apparent that this Court expected the Gruss matter to go back to the Commission with the other questions then pending before it, including the very same questions of diversion-of-traffic and other protective conditions.

The Commission would have had a month to consider Gruss' petition before entering its order of June 9, 1967. But instead of hearing Gruss, it erroneously recited that it had done so. (See note 5 above, p. 10.) It used every effort to avoid hearing Gruss. It opposed Gruss' requested order remanding the case to it, and the District Court held the case, signing an order dismissing Gruss' case unless Gruss filed a supplemental complaint by July 10, 1967

Gruss was forced to go ahead on a supplemental complaint, without having been heard by the Commission in an orderly fashion on his petition. Again the Commission and the United States attacked Gruss' standing on the ground that only the New Haven Trustees could represent the New Haven estate. This time Penn and Central even sought to avoid the challenge to their position by arguing that only an indenture trustee could speak for bondholders, a point which the District Court properly brushed aside (Appendix B to Jurisdictional Statement in No. 778, page B-27, note 16). This time the District Court heard the matter on the merits. It could no longer ignore the fact that Gruss and other bondholders could not properly be represented by the New Haven Trustees, for the Reorganization Court had on July 11, 1967, so recognized (Appendix A to Gruss' Application for Stay).

The effect of the disorderly procedure accepted by the district court was that that court let the merger go ahead while the Commission had never decided the issue of immediate inclusion, and only the stay granted by this Court has prevented the issue from becoming moot.

The Commission in its order of September 12, 1967, after Penn, Central, and the New Haven Trustees had defied its August 1 order, authorized the merger to go ahead, at the very time that it was setting hearings on the question

whether the merger authorization be conditioned on immediate inclusion (Application for Stay in No. 778, Appendix 2). Thus the Commission prejudged a matter on which it was about to hold hearings, in violation of Gruss' right to an orderly hearing. Again, only the stay granted by this Court prevents the issue still pending before the Commission from being made moot.

The issue of immediate inclusion is still undecided by the Commission as this Jurisdictional Statement is written.

This sorry history shows, we submit, that the Court should not be stampeded by tales of the New Haven's distress (which merger without concurrent inclusion of the New Haven would not in any event cure, as argued in Point I). The merger should be enjoined until this Court decides the issue of immediate inclusion or until the Commission passes on the pending proceedings for immediate inclusion, and until appeals from any order of the Commission denying immediate inclusion have been decided.

CONCLUSION

This Court has jurisdiction. The questions presented are substantial.

The order of the District Court should be reversed and remanded with instructions to restrain consummation of the Penn-Central merger unless and until the operations of the New Haven are included on an interim basis by lease or otherwise, pending completion of the New Haven's reorganization proceedings.

Respectfully submitted,

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November 17, 1967

APPENDIX A

Order on Mandate of the Supreme Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Intervening Plaintiff,

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

Intervening Defendants.

On May 8, 1967, the Supreme Court of the United States vacated the order of this Court dated November 28, 1966 which had dismissed the complaint herein, and remanded the case to this Court. The Supreme Court observed that since the order of the Interstate Commerce Commission approving the merger of The New York Central Railroad Company and The Pennsylvania Railroad Company, which plaintiff's suit attacks, was then subject to further consideration by the Commission pursuant to the Supreme

Court's mandate in *Baltimore and Ohio R. Co.* v. *United States,* 386 U.S. 372, and since proceedings to achieve inclusion of the New Haven are under way, it then appeared inappropriate to review this Court's decision. Instead, it stated that plaintiff may attempt a fresh challenge in this Court, should it be dissatisfied with the ultimate order of the Commission in the merger proceedings.

On June 12, 1967, the Interstate Commerce Commission served its Supplemental Report of June 9, 1967 in Finance Docket No. 21989, Pennsylvania Railroad Company—Merger—New York Central Railroad Company, 330 I.C.C. 328, authorizing consummation of the merger transaction 35 days after the service of that Report. Therefore,

IT IS ORDERED by the Court that the complaint in this action be dismissed by the Clerk without prejudice on July 10, 1967, unless plaintiff filed on or before that date a supplemental complaint which attempts to challenge the several orders of the Commission authorizing the merger.

/s/ HENRY J. FRIENDLY
HENRY J. FRIENDLY
United States Circuit Judge

/s/ RICHARD H. LEVET
RICHARD H. LEVET
Senior United States
District Judge

/s/ EDWARD WEINFELD
EDWARD WEINFELD
United States District Judge

June 21, 1967

APPENDIX B

Title 28 U.S.C., the Judicial Code

§ 1398. Interstate Commerce Commission's orders

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub.L. 88-513, § 2, 78 Stat. 695.

Administrative Procedure Act

§ 5(b), 5 U.S.C. § 1004(b)

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the

parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 7(c), 5 U.S.C. § 1006(c)

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

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(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for moneys or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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§ 8(b), 5 U.S.C. § 1007(b)

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

§ 10, 5 U.S.C. § 1009

Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

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Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

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Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determina-

tions the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Bankruptcy Act

§ 77(b)(c)(d)(e)(f)

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with

another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders

of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon the effective date of this amendatory section [Aug. 27, 1935]) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided,* That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every substitute or additional trustee or trustees. The judge shall in his discretion con-

firm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. In operating the business of the debtor with respect to safety, location of tracks, and terminal facilities, the trustee or trustees shall be subject to lawful orders of State regulatory bodies of statewide jurisdiction to the same extent as would the debtor if a petition respecting it had not been filed under subsection (a) of this section except that (A) any such order which would require the expenditure, or the incurring of an obligation for the expenditure, of money from the debtor's estate shall not become effective (a) unless the trustee or trustees, with the approval of the court, shall consent thereto, or (b) unless the Commission, upon appropriate application or applications by an interested party or interested parties, shall find that compliance with the order will not impair the ability of the trustee or trustees to perform his or their duties to the public, will not constitute an undue burden upon interstate commerce, will be compatible with the public interest, and will not interfere with the formulation and approval of a

satisfactory plan of reorganization for the debtor, and (B) compliance shall be made with any applicable provision of the Interstate Commerce Act. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice publish in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20 (a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful. Where such certificates are authorized to provide funds to pay for the acquisition, assembly or installation of safety equipment or materials related thereto, or for the purpose of reimbursing the trustee or trustees, for funds so expended, the judge may direct (without limitation of his power to make such direction in the absence of this provision) that the certificates shall have such lien on the property of the debtor and shall be entitled to such priority in payments over existing obligations, secured or unsecured, and receivership charges and present or future duties,

debts or taxes or other obligations in favor of or payable to any State or any subdivision, agency or instrumentality thereof and interest or penalties, and to such parity with all or any portion of the other costs or expenses of administration or operation as in the particular case the judge may find equitable at the time of authorizing the issuance of such certificates, regardless of whether such obligations, charges, costs or expenses, duties, debts, or taxes constitute or are secured by liens on real or personal property or shall have become payable before or after the issuance of such certificates.

(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to

the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the debtor's estate.

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized in accordance with the provisions of section 1 of the Interstate Commerce Act as amended, or until such operation pursuant to this paragraph is otherwise lawfully terminated. During any such operation, the lessor shall be deemed to be a carrier subject to all applicable provisions of the Interstate Commerce Act, as amended, and shall be entitled to receive just, reasonable, and equitable divisions of rates, fares, or charges applicable to the transportation of persons or property over its line or lines of railroad and the lines of the lessee or other carriers, and the provisions of section 15(6) of the Interstate Commerce Act, as now or hereafter amended, shall apply to said divisions whether or not joint rates covering such transportation have been established.

(7) The judge shall promptly determine and fix a rea-

sonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classifications unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

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(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid

out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by the parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeal from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons

designated or their number, as the public interest may require: *Provided, however,* That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than intervenors and the manner of giving such notice.

(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan

shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party, to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to

the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall

transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action acepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and

materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the

creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). *Provided further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration

of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or

order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and coveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities

issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof.

APPENDIX C

Order on Mandate of the Supreme Court Proposed by Gruss

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ. 3413

OSCAR GRUSS & SON,

Plaintiff,

—against—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Intervening Plaintiff,

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and RICHARD JOYCE SMITH and WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

Intervening Defendants.

On May 8, 1967, the Supreme Court of the United States vacated the Order of this Court dated November 28, 1966, which had dismissed the complaint herein, and remanded the case to this Court for further proceedings in conformity with the opinion of the Supreme Court. The per

curiam opinion of the Supreme Court notes that the Order of the Interstate Commerce Commission in the Penn-Central merger proceedings, which plaintiff's suit attacked, is now subject to further consideration by the Commission, and states that plaintiff may attempt a fresh challenge in this Court, should plaintiff be dissatisfied with the ultimate order of the Commission in the merger proceedings. Accordingly,

IT IS ORDERED that:

(1) The Order of this Court entered on November 28, 1966, dismissing the complaint herein, is vacated.

(2) The cause is remanded to the Interstate Commerce Commission for further proceedings not inconsistent with the Supreme Court's per curiam opinion of May 8, 1967.

(3) This Court reserves jurisdiction to consider any challenge by plaintiff to the ultimate order of the Commission in the Penn-Central merger proceedings.

.....

HENRY J. FRIENDLY
United States Circuit Judge

.....

EDWARD WEINFELD
United States District Judge

.....

RICHARD H. LEVET
Senior U. S. District Judge

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 30226

ANSWER OF OSCAR GRUSS & SON TO PETITION OF THE TRUSTEES FOR ORDER NO. 441

Oscar Gruss & Son ("Gruss") respectfully represents:

1. The Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, filed herein a Report on the Status of the Reorganization and Petition for Instructions As to Their Future Course of Action dated April 5, 1967. A hearing on the Petition was commenced on May 1, 1967, and continued to June 19, 1967. By Order of this Court dated May 25, 1967, the hearing was further continued without date, subject to such future order as the Court may enter on June 19, 1967.

2. For reasons stated below, Gruss requests that the Trustees be instructed to use their best efforts, in negotiating with The Pennsylvania Railroad Company ("Penn") and The New York Central Railroad Company ("Central"), and in proceedings before the Interstate Commerce Commission ("Commis-

sion"), (a) to see that the operations of the New Haven are included with those of Penn and Central at the time of and as a condition precedent to the merger of Penn and Central, and (b) to see that, upon any sale of properties of the New Haven to Penn-Central, the price and terms be as favorable as possible to the New Haven estate and its creditors.

3. In June 1964 the Trustees took the position, before the Commission, that inclusion of the New Haven in the merged Penn-Central should be required by the Commission as a condition precedent to consummation of the merger. Thereafter they conducted negotiations with Penn and Central that resulted in a memorandum of understanding signed on February 5, 1965, and announced on April 7, 1965, and in an "Agreement" dated April 21, 1966, and amended on October 4, 1966. Neither the memorandum nor the "Agreement" was ever submitted for the approval of, or approved by, this Court.

4. In Section 11.7 of the "Agreement", the Trustees limit the statements, stipulations, or other documents to be filed in the Penn-Central merger proceedings, or any judicial review thereof, to documents not inconsistent with the provisions and intent of the "Agreement". In Section 30.4 of the "Agreement," the Trustees affirm that they have a material obligation to use their best efforts, as trustees, to effect consummation of the transactions contemplated thereby.

5. Gruss further requests that, to the extent that compliance with the instructions specified in Paragraph 2 are inconsistent with their "Agreement" dated April 21, 1966, and particularly with the provisions of Sections 11.7 and 30.4 of that document, the Trustees be instructed that such provisions are of no force and effect, and should be disaffirmed.

6. These provisions of the "Agreement" have created a conflict of interest between the fiduciary duties of the Trustees to the New Haven estate and to the creditors of the New Haven on the one hand, and the obligations that they assumed to Penn and Central. Annexed hereto as Exhibit A is a copy of a letter

tional plan of reorganization for the New Haven. We are not as impressed as the Trustees with the difficulties in preparing such a plan, at least under the slower time-table that must now be contemplated. The time required to be spent in preparing an orthodox plan would hardly equal that needed to defend an unorthodox one, not to speak of the latter's hazard of failure at the end of a long period of judicial review. * * * A complete plan would permit a vote to be taken, surely a desirable thing even if, as we rather doubt, the Trustees are right in saying it is not requisite, without precluding a cram-down in the event the needed merger is not obtained and the court finds the facts warrant such action."

11. Heeding, as they say, the admonitions of the Court of Appeals, the Trustees filed with the Commission on June 12, 1967, a supplement to their requested findings and brief, stating that they will no longer press for approval of their "plan" in its present two-step form, and that they will in reasonable course file an amendment setting forth their proposals as to the treatment of all claimants in the estate.

12. Another basic factor is the continued worsening of the financial position of the estate through continued losses substantially exceeding the 1966 deficit, and an accelerating decline in an already precarious cash position. The Committee for the Holders of the Debtor's First and Refunding Mortgage Bonds has pending before this Court a cross-petition for termination of the reorganization proceedings and liquidation of the railroad, which other bondholder representatives may have to support and which the Court may be compelled to grant absent a prompt end to the draining away of estate assets and the accumulation of prior claims. There is no practical alternative to liquidation short of prompt inclusion in a merged Penn-Central, long before there can be a final determination of the issues in the inclusion proceedings.

13. At the oral argument held before the Commission on June 15, 1967, the States of Connecticut, New York, Rhode Island and

Massachusetts all took the position that the Commission should require inclusion on the New Haven operations in the merged Penn-Central, at the time that the merger is consummated. The same basic position was asserted by Manufacturers Hanover Trust Company, as Trustee under the first and refunding mortgage, and by Gruss. Gruss specifically urged that the Commission consider the matter promptly and require simultaneous inclusion of the New Haven as a condition precedent to consummation of the merger.

14. It is clear that simultaneous inclusion of the New Haven at the time of and as a condition precedent to the Penn-Central merger would be in the best interests of the New Haven estate and its creditors. At long last such simultaneous inclusion would bring to an end the enforced subsidy of the New Haven's operations by the creditors that has been going on since the inception of the reorganiation proceedings and the entry of an injunction prohibiting foreclosure of the mortgage indentures, a period of approximately six years. It would clearly be in the best interests of the New Haven estate and its creditors.

15. The likelihood that the Commission will require simultaneous inclusion of the New Haven as a condition precedent to consummation of the Penn-Central merger would be vastly enhanced if it were sought by the New Haven Trustees, along with the creditors and the States affected. It is moreover essential that the details of such inclusion, whether by lease at a nominal rental, or by an interim transfer of properties subject to existing liens, be worked out by the Trustees, their counsel, and the staff of the New Haven.

16. Sections 11.7 and 30.4 of the April 16 "Agreement" clearly prevent the Trustees from seeking any improvement in price and terms of the ultimate sale of properties for the benefit of the estate, and may hamper the Trustees in seeking immediate inclusion of the New Haven operations at the time of and as a condition precedent to the Penn-Central merger. It is essential, therefore, that the Trustees be instructed that those provisions are of no force and effect and should be disaffirmed, and that the

written by counsel for Gruss to Joseph Auerbach, Esq., counsel for the Trustees, on March 10, 1966, urging that the Trustees not undertake such conflicting obligations to Penn and Central.

7. The conflict of interest was manifest in the hearings before the Commission during the first five months of 1967. Throughout those hearings, the Trustees sought to persuade the Commission not to improve the price that the New Haven estate would receive for its properties from Penn and Central. Counsel for the Trustees conducted hostile and aggressive cross-examination of witnesses presented by the creditors, whose testimony would support an improved price for the estate. In their brief and argument before the Commission, counsel for the Trustees sought to discredit such evidence submitted in the best interests of the New Haven estate.

8. As a result of their commitments to Penn and Central the Trustees abandoned their position that the Commission should require inclusion of the New Haven at the time of and as a condition precedent to the Penn-Central merger. Despite their best efforts to advance consummation of the Penn-Central merger, without inclusion of the New Haven until some indefinite time in the future, the merger was delayed at least until August 1, 1967, as a result of the decision of the Supreme Court of the United States in *Baltimore & Ohio R. Co.* vs. *United States*, *U. S.* , 35 U. S. Law Week 4271 (March 27, 1967). Pursuant to a Supplemental Report and Order of the Commission served on June 12, 1967, Penn and Central are now authorized to consummate their merger on July 17, 1967, and have indicated their intention to consummate, if not enjoined, on August 1, 1967.

9. A Petition of Gruss filed with the Commission on July 11, 1966, asking the Commission to modify its Order dated April 6, 1966, to require inclusion of the New Haven at the time of and as a condition precedent to the Penn-Central merger, was denied by the Commission. A proceeding brought by Gruss to review that action of the Commission was dismissed by the United States District Court for the Southern District of New York. *Oscar*

Appendix D

Gruss & Son vs. *United States,* 261 F. Supp. 386 (November 28, 1966). Gruss appealed to the Supreme Court of the United States, and on May 8, 1966, the Supreme Court vacated the Order of the District Court and remanded the case to the District Court for further proceedings in conformity with the Supreme Court opinion. After citing *Baltimore & Ohio R. Co.* vs. *United States, supra,* the Supreme Court opinion states:

> "Since the order which appellant's suit attacked is now subject to further consideration by the Commission and since proceedings to achieve inclusion of the New Haven are also under way before the Commission, it appears inappropriate to review the decision of the District Court at this time. Rather, we vacate the Order of the District Court and remand the case to that court. Should appellant still be dissatisfied with the ultimate order of the Commission in the merger proceedings, it may attempt a fresh challenge in the District Court."

The Mandate of the Supreme Court was docketed in the District Court on June 7, 1967. A proposed order of the District Court on the Mandate of the Supreme Court has been noticed for settlement on June 20, 1967.

10. When the petition of the Trustees for instructions was filed, appeals from this Court's Order No. 404 were pending in the United States Court of Appeals for the Second Circuit. In an Opinion dated May 29, 1967, Order No. 404 was modified to eliminate the provisions opposed by the appellants, all representing bondholders of the New Haven.* The opinion states:

> "At the very best the time-table envisioned by the Trustees in September, 1966, * * * has been thrown badly out of kilter. The Commission may well decide that * * * prudence alone would dictate the formulation of a more nearly conven-

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*The appellants were Gruss; The Chase Manhattan Bank (N.A.), as Trustee under the Debtor's General Income Mortgage; and the Committee for the Holders of the Debtor's First and Refunding Mortgage Bonds.

Appendix D

Trustees be directed to act on behalf of the estate free of any conflicting obligations to Penn and Central.

Respectfully submitted,
OSCAR GRUSS & SON
By: MYRON S. ISAACS
Counsel
475 Fifth Avenue
New York, N. Y. 10017

June 19, 1967.

EXHIBIT A

March 10, 1966

Joseph Auerbach, Esq.
Sullivan & Worcester
185 Devonshire Street
Boston, Massachusetts 02110

Dear Mr. Auerbach:

As you know, I was very much disturbed at the statements you made, in the conferences held on Tuesday at the offices of Simpson, Thacher & Bartlett and in Judge Anderson's chambers, concerning the consideration to be paid by Penn-Central for the business and assets to be acquired from the New Haven.

Your statement that the Trustees believe that they have negotiated a fair and adequate price is not what disturbs me, although I am inclined to believe that some improvement can and should be obtained. Differences of judgment on matters like this are normal, and I would readily concede that the Trustees are far better informed than I, and that their judgment may be correct.

However, you went much further, and said that even if the Trustees on the basis of a more complete record were convinced that a better price should and can be obtained, they are now in the process of signing an agreement that will tie their hands and prevent their assisting the New Haven to take advantage of the

situation. Indeed you said that if it appears, by reason of additional information or changed circumstances, that a better price is obtainable and should be obtained, then the Trustees might have to resign.

It seems to me that the Trustees cannot properly put themselves and the railroad in such a position. Their fiduciary obligation to represent the estate and the security holders is not one that can properly be bargained away. Their undoubted right to negotiate for a sale of the railroad property that they deem advantageous is limited by the requirement that any such agreement be subject to the approval of the Court that appointed them. The Court, as well as the security holders, are entitled to the independent judgment of the Trustees on the matters to be considered from time to time, untainted by any conflicting obligation to other contracting parties.

I am not asking you now to accept the judgment of bondholders' representatives as to the value of the New Haven properties. I am asking you to see that sufficient openness of mind and independence is retained so that bondholders, other security holders, and the Court will not be deprived of the Trustees' services if it should for any reason appear that the arrangement with Penn-Central can and should be improved.

I have discussed the matter now with my clients and they too feel that this matter should be brought formally to the attention of the Trustees.

Very truly yours
MYRON S. ISAACS

MSIRG

cc. James William Moore, Esq.
Robert W. Blanchette, Esq.
Horace J. McAfee, Esq.
Lloyd V. Almirall, Esq.
Joseph Schreiber, Esq.

FILED

NOV 17 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 831

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *et al.*,

Appellants,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

LAWRENCE W. POLLACK
LESTER C. MIGDAL
598 Madison Avenue
New York, New York 10022
Attorneys for Appellant, New York, New Haven and Hartford R.R. Co. First Mortgage 4% Bondholders Committee

MIGDAL, LOW, TENNEY & GLASS
Of Counsel

November 17, 1967

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IN THE

Supreme Court of the United States

October Term, 1967

No.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *et al.*,

Appellants,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (Committee) appeals from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellant's complaint seeking to enjoin the enforcement of an order of the Interstate Commerce Commission, dated June 9, 1967, which permitted immediate consummation of the Penn-Central merger, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

On November 3, 1966, the Committee filed with Mr. Justice Harlan an application for a stay of consummation

of the merger. By Interim Memorandum dated November 6, 1967, Mr. Justice Harlan referred the stay application and similar applications of other parties to this appeal and related appeals to the full Court. To avoid unnecessary repetition we refer herein to various portions of the stay application.

On November 9, 1967, this Court stayed enforcement of the Commission order, consolidated all appeals from the October 19, 1967 order below, and established an expedited schedule to hear all appeals.

Opinions Below

The three-judge United States District Court for the Southern District of New York issued its opinion in this case and related cases on October 19, 1967. The opinion is not yet reported. The opinion has been reprinted as Appendix B to the jurisdictional statement heretofore filed on behalf of Baltimore and Ohio Railroad Company, et al. in related appeal No. 778. Reference is hereby made to said appendix for said opinion.*

The report and order of the Interstate Commerce Commission, dated June 9, 1967, are reported at 330 I.C.C. 328. The Commission's two previous reports and orders, dated April 6, 1966 and September 16, 1966, are reported at 327 I.C.C. 475 and 328 I.C.C. 304, respectively.

The Commission's orders dated August 1, 1967 and September 12, 1967 in the consolidated Penn-Central merger and New Haven reorganization dockets are attached as Appendix 1 and Appendix 2, respectively, to the stay application filed in this Court on behalf of Baltimore and Ohio Railroad Company on November 2, 1967.

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* Reference to pages of said opinion herein will be identified by reference to "B&O, J.S., B- ".

Reference is hereby made to said appendix for said orders.

The Commission's order dated October 5, 1967 in the consolidated Penn-Central merger and New Haven reorganization dockets is reprinted here as Appendix A.

Jurisdiction

The action below was instituted by Oscar Gruss & Son on October 18, 1966 to enjoin the aforesaid Commission order of April 6, 1966. On November 3, 1966, the Committee's motion to intervene as a plaintiff and file its complaint was granted by District Judge Levet. On November 28, 1967, the District Court granted summary judgment dismissing the complaints. See 261 F. Supp. 386 (S.D.N.Y. 1966). On May 8, 1967, this Court vacated the order of dismissal and remanded the case to the District Court. Supplemental complaints were filed in accordance with an order of the District Court dated June 21, 1967.

This action was brought under Title 28, U.S.C. §§ 1336, 2284 and 2321-25, to annul and set aside an order of the Interstate Commerce Commission dated June 9, 1967, and to obtain injunctive relief. The order of the District Court dismissing the complaint "without prejudice to any action plaintiffs may be advised to take with respect to any further order in F.D. No. 21989 relating to temporary assistance to the New Haven or the inclusion of the New Haven in Pennsylvania-Central", was entered on October 19, 1967. Notice of appeal was filed in that court by the Committee on November 1, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, U.S.C. §§ 1253 and 2101 (b).

Questions Presented

The Commission has ordered consummation of the Penn-Central merger, while reserving jurisdiction to determine the following issues, all of which remain pending and undecided at this time:

(a) The feasibility of inclusion of the New Haven and fair and equitable terms and conditions for such inclusion;

(b) A plan of reorganization for the New Haven based upon fair and equitable terms of inclusion;

(c) Just, reasonable and equitable terms of a lease or loan or other appropriate arrangement to assure protection for and continuation of the New Haven's operations until the New Haven was actually included in the Penn-Central system or ceased to operate;

(d) Financial indemnity conditions for traffic diversion losses suffered by the New Haven as a result of the Penn-Central merger.

Under the circumstances, the following questions are presented:

1. Has the Commission violated Section 5(2) of the Interstate Commerce Act in permitting consummation of the Penn-Central merger prior to determination that inclusion of the New Haven in the Penn-Central system is feasible and prior to the formulation of fair and equitable terms of inclusion consistent with the public interest?

2. Has the Commission violated Section 5(2) of the Interstate Commerce Act in permitting consummation of the Penn-Central merger without simultaneous assumption by the Penn-Central system of New Haven's operations?

3. Has the District Court erred in concluding that there should be immediate consummation of the Penn-Central merger despite its finding that essential conditions for interim support of New Haven operations are still pending before the Commission and are incomplete?

4. Has the Commission violated Section 5(2) of the Interstate Commerce Act and the District Court erred in concluding that the Penn-Central merger may lawfully be consummated without providing conditions to protect the freight traffic of the New Haven from diversion to the Penn-Central system until such time as the New Haven was included in the Penn-Central system or ceased to operate as a railroad?

5. Under all the circumstances, has the District Court erred in failing to enjoin consummation of the Penn-Central merger?

Statutes Involved

The statutes involved in this case are: Administrative Procedure Act, §§ 10(a), 10(c), 10(e); 5 U.S.C. §§ 702, 704, 706; Judicial Code, 28 U.S.C. §§ 1253, 1336, 2101 (b), 2284, 2321-25; Interstate Commerce Act, §§ 5(2), 5(9), 49 U.S.C. §§ 5(2), 5(9); Bankruptcy Act §§ 77(b), 77(d), 77(e), 77(f), 77(g); 11 U.S.C. §§ 205(b), 205(d), 205(e), 205(f), 205(g). The text of these statutes is attached hereto as Appendix B.

Statement

The New Haven Railroad is and has been a Debtor in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut, since July 7, 1961. The Committee has been authorized to represent holders of the New Haven's First and Refunding Mortgage Bonds in the reorganization proceedings since February 5, 1962.

On June 25, 1962, the New Haven Trustees filed a petition with the Commission under Section 5(2)(d) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(d), for inclusion of the New Haven's transportation system in the Penn-Central system proposed by the Penn and Central joint application for merger dated March 9, 1962.

During 1964, the New Haven Trustees commenced negotiations with Penn and Central for a sale of the New Haven assets to the merged Penn-Central. An agreement in principle was reached in December 1964 but it was not immediately announced. On March 22, 1965, the Commission Hearing Examiners issued their report in the Penn-Central merger. On March 31, 1965, the New Haven Trustees announced that they had entered into a memorandum of agreement with Penn and Central and that a more definite agreement would follow. The agreement contemplated operation by Penn-Central of New Haven's freight service only. The Commission's order of April 6, 1966 approving the Penn-Central merger contained the following condition with respect to the New Haven:

> "8. The Pennsylvania New York Central Transportation Company shall be required to include in the transaction all the New York, New Haven and Hartford Railroad Company—the inclusion of passenger operations being subject to the findings and determinations of the Commission as set forth in Finance

> Docket No. 23831 issued simultaneously with this report—upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission. Within 6 months after the date this report is served, the parties shall file with the Commission for its approval, a plan for such inclusion. In the event the parties are unable to reach an agreement (and subject to approval by the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose."
>
> • • •
>
> "Jurisdiction is hereby reserved for such purposes. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements." (327 I.C.C. at p. 553)

The passenger discontinuance case referred to above was reported at 327 I.C.C. 151 (1966). That report and order stated:

> "Furthermore, in approving the Penn-Central merger concurrently herewith, the Commission, as *an essential precondition to consummation of the merger,* has required the inclusion of the New Haven into Penn-Central—that is, inclusion of the New Haven's freight and passenger operations." (327 I.C.C. at p. 173) (emphasis added)

The Commission has found that the New Haven cannot withstand competition from a merged Penn-Central system. The Commission stated in its April 6, 1966 report:

> "The Transportation Company, with new routings and improved service, could undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in perhaps an irretrievable situation." (327 I.C.C. at p. 522)

This finding has been uncontroverted throughout the merger proceedings. It is an inevitable conclusion from the fact that the relationship between the New Haven and Penn has been close for many years. Indeed, Penn is the New Haven's single most important connection. This close traf-

fic relationship between Penn and the New Haven has been used by Penn for the purpose of competing with Central for freight traffic to and from points served in common by the Central and New Haven. When Penn and Central are merged, the Penn-Central will have no incentive to use New Haven's facilities and the Penn feed will be lost to the New Haven. The immediate harm to the New Haven is obvious.

The Commission, in its April 6, 1966 report, adopted the findings of the Hearing Examiners (327 I.C.C. at p. 481), one of which states as follows:

> ". . . the proposed merger, in our opinion, would effectively destroy its [NH] ability to survive, for the loss of its existing relationship with P.R.R., and the latter's conversion to an effective competitor would of itself isolate N.H. and destroy any possibility of recovery." (Hearing Examiners' Report, Mar. 22, 1965, p. 345)

Because of the anticipated destructive impact of Penn-Central upon New Haven, the Commission, in its initial approval of the Penn-Central merger, not only found that inclusion of the New Haven in the Penn-Central system is consistent with the public interest (327 I.C.C. at pp. 526-7), but it made the following finding:

> "In this context, and in light of and subject to the order in the section 13a proceeding which is being served simultaneously with this report, *we find that this merger, without complete inclusion of the NH, would not be consistent with the public interest,* and, accordingly, we will require all the New Haven railroad to be included in the applicants' transaction." (327 I.C.C. at p. 524) (emphasis added)

No Appendix G protective conditions were provided for the New Haven by the Commission in the April 6, 1966 report, or any subsequent report. In November, 1966, the Committee pointed out this failure to the District Court, but

the Commission has not thus far made any provision for such protection.

On April 21, 1966, the New Haven Trustees and Penn and Central executed a detailed agreement for the sale of New Haven. The agreement was not, and never has been, submitted to the Reorganization Court for approval. The agreement required the New Haven Trustees to take no position in opposition to the Penn-Central merger and obligated the New Haven Trustees "to use their best efforts, as trustees, to effect consummation of the transactions contemplated hereby." (Gruss, Stay Application, Appendix B). As a result, the New Haven Trustees have considered themselves estopped from seeking inclusion of the New Haven simultaneously with the Penn-Central merger.*

On October 27, 1966, Penn and Central filed a plan for inclusion of the New Haven with the Commission and the New Haven Trustees filed a partial plan of reorganization with the Commission. Both the plan for inclusion and the partial plan of reorganization were based upon the April 21, 1966 agreement to sell the New Haven to Penn-Central.

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* The opinion below stated: ". . . we recognized that matters would appear differently if the reorganization court found that the New Haven Trustees, even though acting in the best of faith had disabled themselves from properly representing the estate on a certain issue, . . . Judge Anderson's order of July 11, 1967, did something along these lines; . . ." (B & O, J.S., B-27). Judge Anderson's July 11, 1967 order stated: "The Trustees and the Pennsylvania and New York Central Railroads entered into the contract in good faith, and the Trustees have quite properly felt under a duty to continue their support of the agreement thus entered into and avoid any action which would be or appear to be a repudiation of its letter or spirit. Therefore, while the Trustees should not oppose the immediate inclusion request by other parties in interest, the court is extremely reluctant to order the Trustees to make such a request without their first being given an opportunity to negotiate with the Pennsylvania and New York Central about necessary amendments to the contract to adapt it to immediate inclusion."

The Commission held hearings on the inclusion and reorganization, on 37 days during the period January 12, 1967 through May 12, 1967, in the Penn-Central merger docket (No. 21989) and the New Haven reorganization docket (No. 21669). Oral argument was held before the full Commission on June 15, 1967 and final briefs were filed on July 17, 1967. The Commission has issued no report to date.

On July 11, 1967, Circuit Judge Robert P. Anderson, (sitting by designation) in the New Haven reorganization proceedings in the United States District Court for the District of Connecticut, issued a "Partial Ruling" on the New Haven Trustees' petition in that court for order No. 441 and the cross-petition of the Committee.* (The Partial Ruling is reprinted in Gruss, Stay Application, Appendix A)

The "Partial Ruling" stated in part:

> "The court is therefore of the opinion that the Interstate Commerce Commission should be asked to order inclusion as soon as the merger takes place."

Following Judge Anderson's July 11, 1967 partial ruling, the States of New York, Massachusetts, Rhode Island and Connecticut and the New Haven bondholder representatives,** requested the Commission to order Penn-Cen-

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* The Trustees petition for order 441 is for instructions as to whether to continue to operate the railroad, and the Committee's cross-petition is for a dismissal of the reorganization proceedings. The petition and cross-petition are reprinted as Appendix A and B to brief submitted below by the Trustees (Record in No. 778, pp. 1944-2069). The petition and cross-petition are still pending.

** The bondholder representatives contemplated that the lease would provide that all operations of the New Haven would be at the risk and for the account of Penn-Central. This was thought to be the equivalent of simultaneous inclusion while permitting the necessary reorganization proceedings to be completed. The Trustees' sales agreement with Penn-Central indicates that it had been expected that the New Haven operations would be included by January 1, 1968.

tral to take over New Haven's railroad operations by lease, immediately upon consummation of the Penn-Central merger. The Commission responded by an order dated August 1, 1967 (served August 3, 1967), issued in both the Penn-Central merger docket and the New Haven reorganization docket, which modified its April 6, 1966 and June 9, 1967 orders, to direct the New Haven Trustees and Penn and Central to file, subject to the Bankruptcy Act, within 30 days, proposed terms of a lease to enable Penn-Central to operate the New Haven during a period from consummation of the Penn-Central merger until the actual inclusion of the New Haven. The order establishes as a condition, that consummation of the Penn-Central merger would constitute Penn-Central's irrevocable assent to operation of the New Haven "under such just, reasonable and equitable lease terms as the Commission may require". (B&O Stay Application, Appendix 1.)

On September 1, 1967, Penn and Central and the New Haven Trustees filed separate proposals allegedly in response to the Commission's order served August 3, 1967. However, neither proposal provided for an interim operating lease as required by the Commission order. Essentially, the Penn-Central proposal provides that Penn-Central will lend the New Haven up to $25 million over a three-year period upon the issuance of Trustees' Certificates having a priority lien status. The New Haven Trustees' proposal also provides for a loan from Penn-Central of up to $25 million upon the issuance of Trustees' Certificates and further provides for a formula arrangement whereby Penn-Central could share, with the creditors and the states, in any interim operating deficits of the New Haven. The Trustees' proposal contemplates that the amount of the operating losses to be borne by Penn-Central be added to the purchase price to be paid by Penn-Central to New Haven if and when inclusion of the New Haven takes place. (The New Haven Trustees' proposal is reprinted as Appendix D to brief submitted below by the

Trustees. Record in No. 778, pp. 1944-2069. The Penn-Central proposal was submitted below as Exhibit A to affidavit of James B. Gray dated September 14, 1967. Record in No. 778, pp. 2086-2138.)

On September 12, 1967, the Commission issued a further order amending its August 1, 1967 order and providing that consummation of the Penn-Central merger would constitute irrevocable assent, subject to judicial review, to an "appropriate arrangement" for protection and interim support of New Haven operations. (B&O Stay Application, Appendix 2.) Hearings on this condition were held by the Commission on September 25, 26 and 27, 1967. Oral argument was held before the full Commission on October 2, 1967 and final briefs were filed on October 12, 1967. The Commission has issued no report to date.

As a result of the decision in the case of *Chase Manhattan Bank, et al.* v. *Smith,* 378 F. 2d 635 (2d Cir. 1967), the New Haven Trustees filed a "conventional" plan of reorganization based upon sale of the New Haven to Penn-Central, with the Commission, on September 1, 1967. (The Trustees' plan is reprinted as Appendix E to brief submitted below by the Trustees. Record in No. 778, pp. 1944-2069.) By order dated October 5, 1967, the Commission has set November 29, 1967 for hearings to commence on the proposed plan of reorganization.

The Questions Presented Are Substantial

The questions presented by this appeal are substantial and require plenary consideration for their resolution. They arise out of the determination by the Commission to ignore the immediate destructive impact of the various Commission orders on the New Haven and its first mortgage bondholders. Consideration of every element of aid or protection to which the New Haven is entitled has been "put aside" by the Commission because of its assumption

that some day, in some manner, the New Haven will be included in the merged Penn-Central system, and at that indefinite future time, the damage caused may be rectified.

The Commission has not even determined if inclusion of the New Haven is feasible, or if fair and equitable terms of inclusion consistent with the public interest can be formulated, although it has recognized that inclusion, even if feasible, will be considerably delayed. Despite those facts, the Commission has relied upon the possibility of inclusion to prevent the New Haven from discontinuing its deficit passenger operations, 327 I.C.C. 151 (1966); to deny the New Haven interim traffic protective conditions; and to delay determination of a time of take over of the New Haven operations and the termination of the shouldering of the continuing New Haven operating losses by the New Haven mortgage bondholders. These questions are discussed below.

I

The District Court erred in failing to enjoin consummation of the Penn-Central merger prior to a determination that inclusion of the New Haven in the Penn-Central System is feasible, especially in view of its recognition that inclusion of the New Haven in the Penn-Central System is uncertain and might never occur.

The Commission has made clear and uncontroverted findings that the Penn-Central merger would have the effect of destroying the freight operations of the New Haven. 327 I.C.C. at page 522 (1966); Hearing Examiners' Report, page 345 (Mar. 22, 1965). Despite these findings, the Commission has failed to provide interim protective conditions equivalent to Appendix G, for the New Haven. Although the Commission made no finding on the issue, its failure to provide protective conditions apparently resulted from an

impression that it was providing the New Haven with something *more* than protective conditions by requiring Penn-Central to include the New Haven. When the Penn-Central merger was previously before this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372 (1967), the facts indicated that the three railroads involved, E-L, D&H and B&M, probably could not withstand competition from a merged Penn-Central system and were awaiting determinations of terms of inclusion in the N&W system, pursuant to a condition fixed in the *N&W-Nickel Plate Merger,* 324 I.C.C. 1 (1964). This Court stated:

> "The sole question before us is whether, in light of the finding as to the necessity for interim protection for the so-called protected railroads, the Commission erred in permitting the consummation of the merger prior to and without awaiting determination of the inclusion proceedings. *We believe that the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads.*" (386 U.S. at p. 378) (emphasis added)

At this time, E-L, D&H and B&M have Appendix G protective conditions and the terms and conditions of their inclusion in the N&W system have been determined by the Commission and upheld by the District Court. The New Haven, however, has no Appendix G protective conditions and the terms of its inclusion in the Penn-Central system have not yet been determined by the Commission. The New Haven's "ultimate fate" has not been determined.

The Commission itself has recognized that basic issues regarding the New Haven inclusion remain to be decided. In its April 6, 1966 report, it stated:

> "The inclusions contemplated by section 5(2)(c) and (d) require a careful weighing of all relevant factors to insure that, if inclusion is to be a condition of approval, it will be feasible, equitable, just and reasonable." (327 I.C.C. at p. 524)

In its September 16, 1966 report, the Commission stated:

> "We indicated in the prior report our awareness of the necessity for satisfying the procedural requirements of Section 77 of the Bankruptcy Act. Speculation as to whether and how the individual statutory requirements apply to the inclusion would have been pointless at that time and is equally pointless now." (328 I.C.C. at p. 319)

Although hearings before the Commission on the terms of a New Haven inclusion have been closed and briefs filed, the Commission has not completed its "careful weighing of all relevant factors" or determined a plan of inclusion found by it to be "feasible, equitable, just and reasonable." It cannot do so until a plan of reorganization pursuant to Section 77 of the Bankruptcy Act based upon inclusion of the New Haven has been heard and determined.

Judge Friendly, in his opinion below, recognized that "the day of such inclusion is at best some time off" (B&O J.S., B-23). He outlined the procedural requirements for inclusion by sale of New Haven assets, and described them as "sources of uncertainty and delay" (B&O J.S., B-24). In fact, Judge Friendly noted that inclusion might be prevented unless this Court reverses its previous position in the case of *St. Joe Paper Co.* v. *Atlantic Coast Line*, 347 U.S. 298 (1954) or Congress passes new legislation (B&O J.S., B-24). Obviously, inclusion of the New Haven is far from certain.

In addition, because of New Haven's deficit operations but valuable real estate interests, serious uncertainties exist as to whether the Commission will be able to fix terms equitable to both Penn-Central and the New Haven creditors and find that inclusion is feasible. There is no question that the New Haven's overall operations are now deficit operations. The proof and arguments presented in the New Haven inclusion proceedings reveal that the value of the New Haven that could be obtained on liquidation of

the assets is more than one hundred million dollars greater than the value that Penn-Central states that it is willing to pay for the New Haven as an operating railroad. The difficult problems involved, although unresolved at this time, cannot be ignored. As the Commission noted in its April 6, 1966 report, Penn-Central itself has contended that:

> "To arrive at equitable terms as to either NH's creditors or the burden that can properly be placed on the Transportation Company's system, would be extremely difficult . . ." (327 I.C.C. at p. 523).

It is entirely possible that the Commission will not require Penn-Central to pay the equivalent of the liquidation value of the New Haven. If that is the case, when an approved plan of reorganization is forwarded from the Commission to the Reorganization Court in accordance with Section 77 of the Bankruptcy Act, it can be expected that the Reorganization Court will recognize that a sale of the New Haven for less than its liquidation value would effect an unconstitutional taking of property. *Railroad Commission of Texas* v. *Eastern Texas Railroad*, 264 U.S. 79, 85 (1924); *Louisville Joint Stock Bank* v. *Radford*, 295 U.S. 555, 602 (1935); *In re Third Ave. Transit Corp.*, 198 F. 2d 703, 707 (2nd Cir. 1952). The Reorganization Court might then send the plan back to the Commission, or might dismiss the reorganization proceedings. These procedures may take months to complete. In the meantime, the New Haven's losses will have dramatically increased because of diversion resulting from the impact of the Penn-Central merger and, if there is no inclusion, those losses will not be recovered.

It is apparent that the problems facing inclusion of the New Haven are much greater than those facing E-L, D&H and B&M when this Court decided the *Baltimore & Ohio R. Co.* v. *United States* case. In his concurring opinion in that case, Mr. Justice Brennan virtually anticipated the New Haven situation, when he stated:

"But decisions of this sort proceed upon the assumption that inclusion will later be possible, and that therefore the finding that the proposed consolidation is in the public interest will not be undermined. This assumption is not always warranted. An inclusion may turn out to be impossible, either because of inability to work out equitable terms, a circumstance upon which inclusion orders have invariably been conditioned, or because upon full consideration the effects of the contemplated inclusion might be regarded as so detrimental that the proposed merger which made necessary the inclusion would be against the public interest" (386 U.S. at pp. 404-405).

* * *

"Where there is a significant possibility, however, that a deferred inclusion upon which a finding of a public interest is premised will be unattainable or attainable only by setting into motion new forces which have not been weighed in evaluating the basic proposal, then the Commission's statutory duty to consider all the relevant factors has not been properly discharged. And I.C.C. action of this sort generally creates dangers far greater than those which normally accrue when an agency or court fails to apply the governing standard to all the relevant facts, since the decision to allow consummation is often irreversible, as it concededly is in this case, or reversible only at enormous expense" (386 U.S. at pp. 405-406).

* * *

Mr. Justice Fortas, in his dissenting opinion in the *Baltimore & Ohio R. Co.* case, disagreed with Justice Brennan's conclusions regarding E-L, D&H and B&M, and stated:

"It is true, as Mr. Justice Brennan argues, that there are problems and difficulties about inclusion of the roads in one of the systems, largely stemming from the poor financial condition of two of the three roads. These difficulties themselves argue for prompt inclusion of the roads in one of the great systems, a result which the three roads' fierce struggle for the last ounce of flesh may paradoxically defeat. But

> judicial pessimism, if it is to lead to administrative nullification, should have a more substantial basis than is present here. There is, in fact, no basis for assuming that the roads will not be included in the N&W; or that the terms and conditions will not be equitable; or that the result will make the Penn-Central merger contrary to the public interest—or that, if any of these happened at the Commission's hands, corrective measures could not be mandated by the courts." (386 U.S. at p. 475.)

In the case of the New Haven, whose disastrous financial condition would have to improve to be labeled as "poor", there *is* a basis for assuming that inclusion will fail, that terms and conditions will not be equitable, that the result will make the Penn-Central merger contrary to the public interest and that corrective measures could not be effectively mandated by the courts.

Judge Friendly's opinion itself recognized that inclusion of the New Haven was uncertain and "is at best some time off". (B&O J.S., B-23.) In fact, it is the District Court's opinion that inclusion may be prevented unless there is such dramatic and unusual action as this Court's reversal of its previous position in the case of *St. Joe Paper Co.* v. *Atlantic Coast Line,* 347 U.S. 298 (1954) or the reversal of the *St. Joe Paper Case* by Congressional action. (B&O J.S., B-24.) The Commission, in its April 6, 1966 report stated:

> "Inclusion of the New Haven's services and the restructuring effort which we call for here and in our ultimate conclusions in the discontinuance case will not be easy. It will demand coordination, cooperation and statesmanship on the part of the many interest involved as well as the railroads. And we do not in any sense overlook the fact that, since New Haven is in bankruptcy, its inclusion will entail reorganization problems under Section 77 of the Bankruptcy Act which must be resolved in conjunction with any inclusion proceeding herein." (327 I.C.C. at p. 525.)

* * *

> "... in the discontinuance report we call for a continuation of public and private effort toward the goal of an ultimate determination which will give the area concerned privately-owned passenger service to be operated without an undue burden on the new Transportation Company and for the economy of the area affected. We have called for both public support and increased effort on the part of railroad management." (327 I.C.C. at p. 525.)

Is it reasonable to conclude that an inclusion which is dependent upon "coordination, cooperation and statesmanship on the part of the many interests involved as well as the railroads", has a substantial degree of certainty?

There is also a basis for assuming that it will not be feasible to fix equitable terms and conditions. Penn-Central itself has argued the difficulty of fixing terms equitable to the New Haven bondholders without placing an undue burden upon the merged Penn-Central system (327 I.C.C. at p. 523). The constitutional questions raised by the possibility that the New Haven is more valuable in liquidation than as an operating railroad, are real and important. The Commission has not yet decided these essential constitutional questions.*

Whatever might be the situation with respect to E-L, D&H and B&M, there is absolutely no question that if the New Haven is not included in the Penn-Central system, the Penn-Central merger would be contrary to the public interest. The Commission, in its April 6, 1966 report, stated:

> "... we find that this merger, without complete inclusion of NH, would not be consistent with the public interest, ..." (327 I.C.C. at p. 524.)

If equitable and constitutional terms and conditions for inclusion of the New Haven are found to be impractical, it

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* District Judge Weinfeld, during the oral argument below, asked Counsel for the Commission to state the Commission's position on this constitutional question. Counsel replied that he could not answer because the Commission still had the question under consideration.

is doubtful that any "corrective measures" could be mandated by the courts. While it may be true that the courts could theoretically mandate corrective measures in the event of the Commission's failure to provide protection for the New Haven, or to provide fair and equitable terms of inclusion, there is little chance that such corrective measures would be effective because the New Haven cannot keep operating during a long period of judicial review and in the face of competition from the merged Penn-Central system. A petition of the Committee to dismiss the reorganization proceedings is even now pending before Judge Anderson in the District Court for the District of Connecticut.

In the *Baltimore & Ohio R.* case, this Court stated:

> "This disposition is also buttressed by the fact that should the immediate consummation of the merger be permitted and at a later date neither the interim conditions nor the inclusion proceedings be disposed of favorably to the continued existence of the merger, the only remedy remaining would be to set it aside and unscramble the consolidation." (386 U.S. at p. 391.)

The same problems will exist if the New Haven inclusion proceedings are disposed of unfavorably to the continued existence of the merger. If the Commission determines that it is not feasible to burden Penn-Central with the constitutional cost of the New Haven, it could grant the discontinuance of New Haven's passenger service, leaving its freight service in operation. Freight service in New England would thus be saved. But the New Haven could not provide such service in the face of a merged Penn-Central system. Such a merger, destroying freight service in New England, would not be in the public interest. Evidence that the New Haven could be successfully reorganized as a freight only railroad is before the Commission in the inclusion proceedings. The Commission has not determined this issue.

II

The District Court erred in failing to enjoin consummation of the Penn-Central merger without simultaneous assumption by the Penn-Central System of the New Haven Railroad Operations.

The Commission has clearly found that the effects of the Penn-Central merger will destroy the New Haven. 327 I.C.C. 475, 522 (April 6, 1966). In addition, the Commission has found that the Penn-Central merger would not be consistent with the public interest without complete inclusion of the New Haven. 327 I.C.C. 475, 524 (April 6, 1966). Although the Commission's April 6, 1966 report does not directly discuss the time for inclusion to take place, its simultaneous report in the passenger train discontinuance case explained:

> "Furthermore, in approving the Penn-Central merger concurrently herewith, the Commission, *as an essential precondition to the consummation of the merger*, has required the inclusion of the New Haven into Penn-Central—that is, inclusion of the New Haven's freight and passenger operations." (327 I.C.C. 151 at p. 173) (emphasis added).

It has become increasingly evident that consummation of the Penn-Central merger without interim protection or assumption of the New Haven operations will cause the eventual destruction of the New Haven and enable Penn-Central to avoid the condition that the New Haven be included.

The court below referred to Judge Anderson's order of July 11, 1967 (Gruss Stay Application, Appendix A) as follows:

> "In his view any substantial postponement of consummation means speedy death for the New Haven; hope lies rather in early consummation subject to a

> commitment that will fairly assure continued operation while the administrative and judicial mills continue their painfully slow grind." (B&O J. S., B 28.)

There is no "commitment" at this time, and in any event, the only "commitment" that would give some assurance that the Commission's intentions would come to pass, is the take over of New Haven operations by Penn-Central simultaneously with the merger. The Committee's petition to dismiss the reorganization proceedings on the grounds that continued loss operations at the expense of the creditors constitutes a taking of the creditors' property without just compensation, in violation of the due process clause of the Constitution, is pending before the Reorganization Court. (Trustees' brief, Appendix B submitted below. Record in No. 778, pp. 1944-2069.) Judge Anderson has long recognized that the constitutional rights of the creditors cannot be disregarded no matter how great the public interest in continued railroad operation. (See excerpts from district court opinions, reprinted in Gruss, Stay Application, Appendix C.) As this Court stated in *Railroad Commission of Texas* v. *Eastern Texas Railroad*, 264 U.S. 79 (1924):

> "And if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss or to give up the salvage value would be to take its property without the just compensation which is a part of due process of law." (264 U.S. at p. 85.)

The present problems of the New Haven are not simply the finding of sufficient cash to enable the New Haven to meet its payroll. The further erosion and potential destruction of the security of the mortgage bondholders is not permitted by the Constitution and that situation will not be

changed by the borrowing of cash to meet day to day operations.

The only "inclusion" that could have any relevance in light of the Commission's findings of the destructive impact of the Penn-Central merger upon the New Haven, is an inclusion or take over of New Haven operations simultaneously with the Penn-Central merger.

III

The District Court erred in concluding that there should be immediate consummation of the Penn-Central merger despite its finding that essential conditions for interim support for the New Haven were still pending before the Commission and were incomplete.

No Appendix G conditions have been established for the benefit of the New Haven to preserve the freight traffic status quo pending inclusion. Because a lease form of immediate inclusion of the New Haven operations will solve the New Haven's cash problem and obviate the necessity of providing interim protective conditions or indemnity for diversion of traffic, several creditor representatives, including the Committee, requested the Commission to order Penn-Central to take over the New Haven operations simultaneously with consummation of the merger. The states of New York, Massachusetts, Connecticut and Rhode Island also requested the Commission to order immediate inclusion. Judge Anderson, in his July 11, 1967 order, stated his opinion that the submission of requests for immediate inclusion would be "very much in the interests of the Debtor's estate". (Gruss, Stay Application, Appendix 1)

The Commission, by order dated August 1, 1967, required that consummation of the Penn-Central merger would constitute Penn-Central's irrevocable assent to a

lease on fair and equitable terms prescribed by the Commission, subject to judicial review. On September 1, 1967, ignoring the Commission's suggested operating lease, both Penn-Central and the New Haven Trustees proposed loan arrangements secured by priority lien Trustees' Certificates. After more than six years in reorganization and in the face of continuing losses, a loan such as that proposed by Penn-Central would be of no benefit to the New Haven estate and could neither be constitutionally justified nor tolerated. It seems highly unlikely that, at this stage in the proceeding, authority to borrow further money and issue Trustees' Certificates could or would be granted by the Reorganization Court. Certainly, further borrowing should not be authorized until after the Committee's petition to dismiss the reorganization is decided. *Bankers Trust Co.* v. *Gebhart,* 195 F. 2d 238 (2nd Cir. 1952); *In re Third Ave. Transit Corp.* 198 F. 2d (2d Cir. 1952).

Although Penn-Central has opposed the suggestion, the New Haven Trustees have proposed to the Commission that the loan be conditioned upon a formula that would have the effect of shifting the burden of operating losses to Penn-Central by way of adjustments to the purchase price for the New Haven assets. The proposal, however, fails to provide for the possibility that final sale of the New Haven assets to Penn-Central may not occur. It has the effect of fixing all losses on the bondholders if the Commission or the Reorganization Court does not find it feasible to include the New Haven. It makes a mockery of the presentation of a plan of reorganization to a bondholders' vote, since it has the effect of providing that all losses will fall on the bondholders if they vote against the plan of reorganization.

By its order served September 12, 1967 (B&O Stay Application, Appendix 2), the Commission amended its August 1, 1967 order and imposed an additional condition to the Penn-Central merger by providing that consummation of the merger would constitute an irrevocable assent of Penn-

Central "to lease the New Haven or enter into a loan or other appropriate arrangement with the New Haven for continuation of the New Haven's operations under such just, reasonable and equitable terms as the Commission may require", subject to judicial review. Hearings have been held on this condition and briefs filed, but no determination has been made by the Commission. The opinion below stated:

> "To be sure we are confronted, as we were a year ago, with a condition that is not in all respects complete, although far more nearly so than the Appendix G conditions as they then stood. But with the situation now so serious, there can hardly be doubt that it is better to accept what is good for the New Haven than permit the patient to die while in quest of the best." (B&O J.S., B-29)

But, as long as the question of the mode of interim operation of the New Haven remains undetermined, incomplete and subject to judicial review, there is no "commitment" to assure continued operation and there is nothing that is "good" for the New Haven in consummation of the Penn-Central merger, and much that is bad.

While the New Haven's difficult cash situation has not been caused by the approval of the Penn-Central merger,* the spectre of that merger has prevented the New Haven problems from being solved by action of the various government bodies concerned. Indeed, it has been exacerbated by the Commission's failure to grant the New Haven's passenger discontinuance petition. Since operation of the New Haven is considered to be vital to the New England

* New York Central has made the situation worse by failing to pay to New Haven more than $1,500,000 (as of December 31, 1966) of profits earned from operation of the real estate holdings in the Grand Central Terminal area in New York City. This sum is claimed by the New Haven and an action has been instituted in the New York State Supreme Court.

area, it could logically be expected that if the New Haven were forced to stop operations because of lack of cash, the four concerned states or the Federal Government would exercise rights of eminent domain to assure continued operation. This would place the burden of serving the public interest on the communities served, rather than on the New Haven's creditors.

The states have requested the Commission to order some form of interim take-over of the New Haven because they are unwilling to provide interim cash subsidies to the New Haven sufficient to continue the operation of the railroad until its actual inclusion in Penn-Central. The subsidy requirements will become much greater after Penn-Central has merged and before the New Haven is included because the New Haven will have lost the Penn traffic that is diverted to the Central.

If a plan of reorganization of the New Haven is not concluded, the states will be forced to condemn the New Haven property in the public interest and Penn-Central will avoid the Commission requirement that New Haven operations be assumed by it. It will then be free to negotiate with the states for such portions of the New Haven it desires or requires, at arms length and free of the Commission's requirement as to fairness and equity. It will have accomplished its merger and avoided the essential conditions imposed by the Commission.

IV

The District Court erred in concluding that the Penn-Central merger may lawfully be consummated without the Commission having provided conditions to protect the freight traffic of the New Haven from diversion to the Penn-Central System until such time as the New Haven was included in the Penn-Central System or ceased to operate as a railroad.

As noted by the court below, the issue of financial indemnity conditions is pending before the Commission in the New Haven inclusion proceedings, but there are no Appendix G conditions for protection of the New Haven in the event that inclusion is delayed or does not occur (B&O J.S., B-29, 30). The District Court's conclusion that the Interstate Commerce Act does not require protection against diversion of traffic because the New Haven may fail even without the merger, is simply incorrect. It is established that the merger will destroy the New Haven and that is not in the public interest. Section 5(2) of the Interstate Commerce Act permits approval of a merger only if it is consistent with the public interest and Section 5(2)(c) specifically directs the Commission to give weight to the effect of the merger upon other railroads in the territory. Losses from merger diversion will occur while the New Haven continues to be independently operated. The New Haven is entitled to protection against those losses, especially since those losses will hasten and insure its demise. *Baltimore & Ohio R. Co.* v. *United States, supra;* 49 U.S.C. § 5(2). See *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944); *Chicago Junction* Case, 264 U.S. 258 (1924).

If Penn and Central are merged before the New Haven is included or protected against diversion, Penn-Central will be free to litigate interminably the question of whether the terms of inclusion are "equitable". At the same time

it will have an interest in and the power to divert the New Haven's traffic drastically. The Estate will not be able to withstand the losses and the governments will have no interest in continuing their support. Penn-Central and the states will be able to force the New Haven bondholders to capitulate to Penn-Central or to seek termination of the reorganization proceedings, without recovery of any part of the losses resulting from diversion.

If inclusion fails or the reorganization proceedings are dismissed, the governmental authorities which represent the public interest will be required to continue railroad operations. The Commission will have, by its failure to provide the New Haven with protection against the admittedly destructive competition from Penn-Central, imposed the diversion losses upon the governments.

At this indefinite stage of the proceedings, only two possibilities exist: inclusion or the dismissal of the reorganization. In the event of inclusion, the Commission has pending before it the determination of provisions for indemnity for diversion losses and for the sharing of losses not caused by diversion in the period between merger and inclusion. In the event that the reorganization proceedings are dismissed and there is condemnation of all or part of the New Haven and operation by governmental authority, the Commission has failed to provide protection from the damages that are certain to occur between merger and condemnation and thereafter. If the reorganization proceedings are dismissed and condemnation does not take place, the Commission has failed to provide for protection between the time of merger and cessation of operations. Proof has been presented in the New Haven Inclusion proceedings that the New Haven could be profitably operated on a freight-only basis, and the Commission has strongly indicated that its denial of permission for the New Haven to discontinue its deficit passenger operations was based upon an expectation of inclusion. See 327 I.C.C. 151 (Apr. 5, 1966).

The Commission's requirement that Penn-Central not object to inclusion of the New Haven and its reservation of jurisdiction to provide indemnity for diversion of traffic in the pending inclusion proceedings does not satisfy the statutory requirements of Section 5(2) of the Interstate Commerce Act. *Baltimore & Ohio R. Co.* v. *United States, supra.* The absence of protective conditions against diversion following the merger is a fatal omission. The Commission refuses to recognize that inclusion of the New Haven in the Penn-Central system may never take place, even though, at this stage in the proceedings, it has not determined whether fair and equitable terms of inclusion consistent with the public interest can be formulated.

Conclusion

This Court has jurisdiction of this appeal. The questions presented are substantial.

The order of the District Court should be reversed and remanded with instructions to restrain consummation of the Penn-Central merger unless and until the risk of New Haven's operations are assumed by Penn-Central between the date of consummation of the merger and the completion of the New Haven's reorganization proceedings.

Respectfully submitted,

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MIGDAL, LOW, TENNEY & GLASS
Of Counsel

November 17, 1967

APPENDIX A

Order

SERVICE DATE
October 6, 1967

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of October, 1967.

Finance Docket No. 21989

PENNSYLVANIA RAILROAD COMPANY—MERGER—
NEW YORK CENTRAL RAILROAD COMPANY

Finance Docket No. 21990

PENNSYLVANIA RAILROAD COMPANY STOCK ISSUANCE

Finance Docket No. 24361

PENNSYLVANIA RAILROAD COMPANY SECURITIES
AND ASSUMPTION OF OBLIGATIONS

Finance Docket No. 21669

NEW YORK, NEW HAVEN & HARTFORD RAILROAD
COMPANY REORGANIZATION

On September 1, 1967, the Trustees of the property of the New York, New Haven and Hartford Railroad Company filed Supplementary Statement No. 2 and Amendment No. 2 to their plan of reorganization of that railroad, and they requested an appropriate order of notice of the filing, fixing a date for hearing thereon.

It appearing, That the matter is one which the Commission is authorized to refer to an examiner;

And it further appearing, That the record warrants the conclusion and we so find that the due and timely execution

of the Commission's functions imperatively and unavoidably requires the omission of an examiner's report and recommended order:

It is ordered, That the matter be, and it is hereby referred to Examiner Arthur S. Present, for hearing on November 29, 1967, at 14th Floor, GSA Building, 30 Church Street, New York, N. Y., at 9:30 o'clock a.m. United States Standard Time;

It is further ordered, That the Trustees of the property of the New York, New Haven and Hartford Railroad Company shall make available at the hearing a competent witness or witnesses for examination on all material and relevant facts recited in their Supplementary Statement No. 2 and Amendment No. 2 to their plan of reorganization, which pleading is part of the record subject to the right of full cross-examination by protestants and interveners in opposition;

It is further ordered, That on or before November 3, 1967, the New Haven Trustees shall distribute by first-class U. S. mail a copy of each exhibit which they propose to offer in evidence, including the statement of each witness to appear at the hearing, to the examiner and to those parties who are on the service list for these proceedings initially consolidated for hearing by order of November 9, 1966;

It is further ordered, That on or before November 24, 1967, every party desiring to rebut said exhibits shall distribute by first-class U. S. mail a copy of each rebuttal exhibit which it proposes to offer in evidence, including the rebuttal statement of each witness to appear at the hearing, to the examiner and to those parties on the service list as heretofore indicated;

It is further ordered, That each party shall assign numbers to its exhibits prefixed by an appropriate designation identifying the party;

It is further ordered, That all parties presenting evidence at the hearing shall afford to other interested parties reasonable access to all working papers and underlying data supporting their respective exhibits, under conditions mutually agreeable or as may be directed by the examiner;

It is further ordered, That the hearing shall be governed by the procedures set forth in the report and order on prehearing conference herein, dated December 21, 1966;

It is further ordered, That any party desiring to be notified of any change in the time or place of the hearing (at his own expense if telegraphic notice becomes necessary) shall inform the Secretary, Interstate Commerce Commission, Washington, D. C. 20423, by written notice at least 30 days prior to the date of the hearing;

And it is further ordered, That a report and recommended order by the examiner to whom these proceedings are assigned for hearing be omitted as part of the decision-making process in these proceedings, and the record herein shall be considered as certified to the Commission for initial decision when received by the Secretary of the Commission for filing in the docket.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX B

Statutes Involved

Administrative Procedure Act

Section 10(a), 5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(c), 5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 10(e), 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Judicial Code

28 U.S.C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Appendix B

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. § 2101(b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. § 2284.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any de-

partment or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants. Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State

statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. § 2321.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. § 2322.

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. § 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Com-

mission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2324.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. § 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Appendix B

Interstate Commerce Act

Section 5(2), 49 U.S.C. § 5(2).

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in sub-division (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carrier involved in the proposed transaction is situated, and also such carriers and the ap-

plicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed

transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the

period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(9), 49 U.S.C. § 5(9).

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

Bankruptcy Act

§ 77(b)(d)(e)(f)(g), 11 U.S.C. § 205(b)(d)(e)(f)(g)

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on un-

funded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not pre-

clude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accord-

ance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party, to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the re-

quirements of subsections (b) (and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does

not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The

plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof,

or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affceted by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the revelant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). *Provided further,*

That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operations shall be determined on a

basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any state or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and convey-

ance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable

with respect to any action or matter which is within the provisions of subsection (p) hereof.

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

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JOHN F. DAVIS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 832

ERIE-LACKAWANNA RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1967

ERIE-LACKAWANNA RAILROAD COMPANY, ET AL.,
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UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Erie-Lackawanna Railroad Company (EL) and The Delaware and Hudson Railroad Corporation (D&H) appeal from that part of the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellants' complaints seeking to enjoin the enforcement of orders of the Interstate Commerce Commission (the Commission), dated April 6, 1966, September 16, 1966, and June 9, 1967, which permitted immediate consummation of the merger of Pennsylvania Railroad Company and The New York Central Railroad Company (the Penn-Central *Merger* case). That judgment also affirmed the orders of the Commission dated June 9, 1967, and August 10, 1967, directing the Norfolk and Western Railway Company (N&W) to include EL, D&H and Boston and Maine Corporation (B&M) in the N&W system (the *Inclusion* case).

OPINION BELOW

The memorandum order of July 3, 1967, and the October 19, 1967, opinion of the statutory three-judge court convened in the Southern District of New York are not yet reported. Copies of those decisions are reproduced as Appendices A and B, respectively, to the Jurisdictional Statement in No. 778, with which this appeal will be consolidated pursuant to this Court's per curiam order of November 9, 1967. The reports and orders of the Commission, dated April 6, 1966, September 16, 1966, and June 9, 1967, are reported at 327 I. C. C. 475, 328 I. C. C. 304 and 330 I. C. C. 328, respectively.

JURISDICTION

This action, commenced under 28 U. S. C. §§ 1336(a), 1398(a), 2284 and 2321-25, was brought to enjoin, annul and set aside orders of the Commission dated April 6, 1966, September 16, 1966, and June 9, 1967. The order of the district court dismissing the complaints was entered on October 19, 1967. Notice of appeal was filed in that court on November 17, 1967. Jurisdiction of this Court to review the order of the district court by direct appeal is conferred by 28 U. S. C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

Solely because of the concurrent appeals from the Commission's orders in the *Inclusion* case and in the *Merger* case the following questions are presented:

1. Whether the Commission's order permitting immediate consummation of the Penn-Central merger satisfied the mandate of this Court requiring that the ultimate fate of EL, D&H and B&M be determined prior to consummation of that merger.

2. Whether the Commission should have reserved jurisdiction to require a capital loss indemnification of EL and D&H by Penn-Central in the event that judicial review and remand of the *Inclusion* case resulted in a downward revision of the terms for inclusion of EL and D&H in N&W because of the alleged traffic consequences of the Penn-Central merger.

Should the Court affirm or dismiss the concurrent appeals from the district court's affirmance of the Commission's order in the *Inclusion* case and its affirmance of the Appendix G conditions in the *Merger* case the foregoing questions will become moot.

STATUTES INVOLVED

The statutes involved are the Interstate Commerce Act, Sections 5(2) and 5(9), 49 U.S.C. §§ 5(2) and 5(9), and the Judicial Code, 28 U. S. C. §§ 1253, 1336(a), 1398(a), 2101(b), 2284 and 2321-25. The texts of those statutes are set forth in Appendix A hereto.

STATEMENT

This appeal, together with the appeals of Baltimore and Ohio Railroad Company, *et al.*, in No. 778; Oscar Gruss & Son, in No. ; New York, New Haven & Hartford Railroad Company First Mortgage 4% Bondholders Committee, in No. ; City of Scranton, *et al.*, in No. , and Reading Company in No. , bring to this Court for the second time the decision of the Commission approving the Penn-Central merger. Operation of the Commission's orders of April 6, 1966, and September 16, 1966, authorizing consummation of that merger, was enjoined

pursuant to the decision of this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967), holding that it was necessary to determine the future of EL, D&H and B&M before the Penn-Central merger could be consummated.

By its order of June 9, 1967, in the *Merger* case, the Commission authorized consummation of the Penn-Central merger on or after July 17, 1967. By a simultaneous order in the *Inclusion* case, the Commission directed N&W to acquire EL, D&H and B&M on specified terms.

On July 3, 1967, the United States District Court for the Southern District of New York preliminarily enjoined the enforcement of the order in the *Merger* case pending consideration by it of appeals from the Commission's orders in that case. On October 19, 1967, the district court entered its judgment dismissing the complaints of appellants and others which attacked the Commission's orders in the *Merger* case and the earlier Commission orders upon which that order was based. Jurisdictional Statement, No. 778 (J. S. 778), at B-71-72. The district court stayed the enforcement of the Commission's order of June 9, 1967, for 15 days or until the determination of any application for a stay filed in this Court within that period. *Ibid.*

In its unanimous decision of October 19, 1967, the three-judge district court also upheld the Commission's decision the *Inclusion* case. That the *Inclusion* and *Merger* cases are interrelated was recognized by this Court on the earlier appeal in the *Merger* case, *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. at 378, 390-92, acknowledged by the Commission in issuing its orders in both cases on the same day and by the court below in disposing of all actions with respect to those cases in a single opinion and judgment, J. S. 778, at B-1, and confirmed by this Court's per curiam order of November 9, 1967, consolidating all appeals from that single judgment.

The Commission's decisions in both the *Inclusion* and *Merger* cases are now under attack in this Court. Appellants in No. 778 urge the illegality of the Commission's prescription of protective conditions for the benefit of EL, D&H and B&M in Appendix G to its report and order in the *Merger* case. J. S. 778, at 3-4. Because of the possibility, which we believe is small, that the protective conditions thus imposed would not be sustained or, alternatively, that the *Inclusion* case might be remanded to the Commission, appellants requested the court below to stay the consummation of the Penn-Central merger, pending final disposition by this Court of the two cases. The district court declined, in part because of its confidence that its decision with respect to the *Merger* and the *Inclusion* cases was correct and in part because of its belief that any further delay in consummation of the Penn-Central merger might result in interruption of the operations of the New York, New Haven & Hartford Railroad Company. J. S. 778, at B-68-69.

The major attack upon the Commission's decision in the *Inclusion* case comes from N&W.* Jurisdictional Statement, No. 779 (J. S. 779). Basically, N&W argues that the price which the Commission found to be fair and equitable to all the parties is too high. In support of that position, N&W challenged before the Commission and the court below nearly all of the particular findings concerning the elements of value of the three roads to be included.

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*A minor and belated assault upon that decision was also launched in the district court by a group of EL bondholders who had deliberately declined to participate in the administrative proceedings until the matter was submitted to the full Commission. They have now filed a notice of appeal to this Court. B&M also contested the Commission's order in the court below and has filed a notice of appeal.

Among other things, N&W has contended that Penn-Central will have an impact on the traffic of EL and D&H, even after their inclusion in N&W, which requires a further downward adjustment of the terms for inclusion. Both the Commission and the court below have thoroughly considered and rejected all of N&W's challenges. We believe this Court will similarly reject N&W's contentions.

However, EL and D&H requested the Commission to retain jurisdiction in the *Merger* case for the purpose of requiring Penn-Central to indemnify appellants for any capital loss found to be incurred by them as a result of the Penn-Central merger. That step was taken as a necessary precaution against the admittedly slight possibility that a reviewing court might remand the *Inclusion* case to the Commission for a possible downward adjustment of the terms because of the alleged impact of Penn-Central. The Commission found that a reservation of jurisdiction was unnecessary because it believed the order in the *Inclusion* case would survive judicial review. 330 I. C. C. 328, 329. The district court concluded that the Commission was not required to retain jurisdiction for that purpose, although it "would not have disapproved the reservation of jurisdiction". J. S. 778, at B-17. Again, the principal basis for the district court's decision was its confidence that this Court would not overturn the decision with respect to that issue. *Id.* at B-16. We share the confidence of the Commission and the court below. However, the stakes are too high to justify us in treating that confidence as a certainty.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL IF THE COURT REMANDS EITHER THE *INCLUSION* CASE OR THE APPENDIX G CONDITIONS TO THE COMMISSION.

I.

THIS COURT HAS DECIDED THAT CONSUMMATION OF THE PENN-CENTRAL MERGER SHOULD BE DEFERRED UNTIL THE ULTIMATE FATE OF EL AND D&H IS FINALLY DETERMINED.

This Court decided that consummation of the Penn-Central merger must be deferred until the "ultimate fate" and "future" of EL and D&H—as well as B&M—is finally determined. *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, 378, 390. The fate and future of EL and D&H are dependent upon the Commission's order in the *Inclusion* case surviving judicial review unimpaired. The district court refused to stay consummation of the Penn-Central merger because it entertained "no doubt with respect to [its] rulings" in the *Merger* and the *Inclusion* cases. J. S. 778, at B-68-69. However, should consummation of the Penn-Central merger be allowed prior to the culmination of judicial review and, in the course of that process, the protective conditions accorded EL and D&H be stricken down or the decision in the *Inclusion* case overturned, EL and D&H would be required to face alone the massive impact of the largest railroad merger in our history. That result is precisely what the Court intended to prevent by its decision last term, and, our position now is intended simply to preclude even the slight possibility that EL and D&H might somehow be backed into the position in which they were before that decision last spring.

The Commission has found that "the appendix G railroads will require the interim protection of appendix G" if for any reason there is a time lapse between the consummation of the Penn-Central merger and the inclusion of EL and D&H in the N&W system. 330 I. C. C. 328, 329. However, the validity of those interim protective conditions is now under attack by N&W and its allies in this Court. *See, e.g.,* J. S. 778, at 3-4.

We believe those conditions are lawful and will be sustained by this Court. However, we obviously cannot guarantee that result. The Commission's decision in the *Inclusion* case has also been attacked by N&W (and others) in this Court. We share the confidence of the Commission and the district court in the correctness and validity of that decision.

However, it seems inconceivable and certainly not contemplated by this Court that the Penn-Central merger could be consummated without both a final resolution of the validity of the Appendix G conditions and a final resolution of the future of EL and D&H.

II.

THE COMMISSION SHOULD HAVE RESERVED JURISDICTION TO REQUIRE A CAPITAL LOSS INDEMNIFICATION OF EL AND D&H BY PENN-CENTRAL, SHOULD JUDICIAL REVIEW AND REMAND OF THE *INCLUSION* CASE RESULT IN DOWNWARD REVISION OF THE TERMS FOR INCLUSION BECAUSE OF THE ALLEGED TRAFFIC CONSEQUENCES OF THE PENN-CENTRAL MERGER.

The possibility that a capital loss indemnity of EL and D&H by Penn-Central might be required is founded upon the public interest in maintaining rail competition to the ex-

tent feasible after consummation of the Penn-Central merger. The Commission has found that the service which EL and D&H provide is essential and must be preserved. 327 I. C. C. 475, 529. The Commission has further found that, unless EL and D&H are included in a major system, it is doubtful whether they could survive the competition of a merged Penn-Central. *Id.* at 532.

EL, D&H and B&M provide the only substantial rail competition with Penn-Central in the area east of Buffalo, New York. N&W's present lines do not run east of Buffalo or north of Hagerstown, Maryland, and, therefore, the inclusion in N&W of those three roads, with their lines from Buffalo to New York City, northern New York, Montreal and New England, is a logical step to provide routes in the Northeast competitive with Penn-Central. 330 I. C. C. 780, 792. The Commission has stated in the *Inclusion* case that, because of the effects upon competition, it is "firmly convinced" that inclusion of EL, D&H and B&M in N&W is preferable to their inclusion in Penn-Central. *Id.* at 796.

In authorizing consummation of the Penn-Central merger, the Commission acted with the expectation, but without the necessary certainty, that its order in the *Inclusion* case would survive judicial review. 330 I. C. C. 328, 329. The district court declined to require the Commission to retain jurisdiction for the purpose of imposing a capital loss indemnity provision on Penn-Central (1) because of its decision upholding the Commission's action in the *Inclusion* case, as to which it entertained no serious doubt, J. S. 778, at B-16, B-69; (2) because it doubted that any decision by this Court would result in a downward revision of the terms for inclusion, *id.* at B-16; (3) because it was not certain that this Court or the Commission on remand would require a capital loss indemnity, *ibid.;* and (4) because of the possibility of the imposition of such a condi-

tion subsequent to consummation of the Penn-Central merger, *id.* at B-16-17, B-69.*

The capital loss indemnity issue arises here only because N&W has again asserted that even after EL and D&H are included in N&W, they would lose a substantial amount of traffic to a merged Penn-Central. Therefore, N&W contends that the price which the Commission found fair and equitable to all parties should be adjusted downward to reflect that alleged traffic loss. J. S. 779, at 3, 12 n.6; N&W's Brief of September 5, 1967, in the *Inclusion* case at 18-31.

If the Commission should conclude upon any remand that, because of an alleged future diversion by Penn-Central of a substantial amount of EL and D&H traffic, N&W should pay a price for EL and D&H which is substantially less than the price which N&W has been directed to pay, then the Commission could not fix terms for inclusion in N&W which are equitable to EL and D&H. On the other hand, the Commission might determine that it would not be consistent with the public interest to include EL and D&H in Penn-Central. Thus the service rendered to the public by EL and D&H would be destroyed, rail competition in the northeastern United States eliminated and the communities which those roads serve seriously and irreparably injured.

In that event the only salvation to EL and D&H and to the public they serve would be the imposition by the Commission in the *Merger* case of a condition requiring a capital indemnity from Penn-Central to the stockholders of EL and D&H, pursuant to Section 5(2)(b) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(b), sufficient to enable the Commission to frame equitable terms for their inclusion in

*The Commission stated to the court below that if the *Inclusion* order were set aside the Commission might properly be directed to consider imposition of a capital loss indemnification condition in the *Merger* case. Commission Brief of August 28, 1967, at 14; *cf.* J. S. 778, at B-17, B-69.

the N&W system. By failing to reserve jurisdiction to meet that possibility, the Commission has failed to take a desirable and necessary precaution to protect appellants and the public served by them.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

November 17, 1967.

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APPENDIX A

JUDICIAL CODE

28 U. S. C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U. S. C. § 1336(a).

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U. S. C. § 1398(a).

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

28 U. S. C. § 2101(b).

Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U. S. C. § 2284.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three

judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference

thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent juristiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U. S. C. § 2321.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than

for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U. S. C. § 2322.

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U. S. C. § 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said

action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U. S. C. § 2324.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U. S. C. § 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

INTERSTATE COMMERCE ACT

Section 5(2), 49 U. S. C. § 5(2).

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate

the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or persons seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e) [§ 305(e) of this title], and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and

reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part [§ §1-5, 5b-15a, 16, 17-23, 26, 27 of this title], or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or

other railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part [§§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title], the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act [15 § 77c; §§ 1-5, 5b-15a, 16, 17-23, 26, 27, 301-305, 306-327, 901-923, 1001-1022 of this title], an agreement pertaining

to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(9), 49 U. S. C. § 5(9).

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

No. 833

FILED
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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BOSTON AND MAINE CORPORATION,
Appellant,

-against-

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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JURISDICTIONAL STATEMENT

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BOSTON AND MAINE CORPORATION,
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-against-

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Appellees.

On Appeal from the United States District Court for the Southern District of New York

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JURISDICTIONAL STATEMENT

Appellant Boston and Maine Corporation (B&M) appeals from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing this appellant's complaint which sought the reversal, in part, of an order of the Interstate Commerce Commission and a remand of the proceeding in which the Commission had entered the said order which directed the inclusion of B&M, as a subsidiary of the Norfolk and Western Railway Company (N&W), in a system to be composed of N&W, Erie-Lackawanna Railroad Company (E-L), the Delaware and Hudson Railroad Corporation (D&H), and B&M, on terms and conditions specified by the Commission. B&M submits

this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented by it.

OPINION BELOW

The opinion and judgment of the statutory three-judge court entered on October 19, 1967, in the United States District Court for the Southern District of New York is not yet reported. It will not be included in the appendix hereto since it is already before the Supreme Court as Appendix B to the jurisdictional statement of the appellant Norfolk and Western Railway Company in its appeal from the same judgment below, No. 779, October Term, 1967. A memorandum order of the court below of July 26, 1967, dealing with certain interlocutory matters is also before the Supreme Court as Appendix A to the jurisdictional statement of N&W. The Supplemental Report of the Interstate Commerce Commission, dated June 9, 1967, from which B&M appealed below, is reported at 330 I.C.C. 780, and the Commission's Report on Reconsideration dated August 10, 1967, as modified on September 1, 1967, is reported at 331 I.C.C. 22. Copies of the Commission's Reports and Orders have been lodged with the Clerk of the Supreme Court in No. 779.

JURISDICTION

The action in the court below was instituted by the Delaware and Hudson Railroad Corporation (D&H) on June 23, 1967, to suspend, enjoin and set aside in part the Commission's order of June 9, 1967, in F.D. No. 21510. On June 30, 1967, B&M sought leave to intervene as a party plaintiff in said action. Intervention of B&M was granted by order of the district court entered on July 10, 1967.

The action of B&M is brought under sections 1336, 2284, and 2321-2325 of Title 28, United States

Code, to enjoin, annul and set aside the Supplemental Order of the Interstate Commerce Commission, dated June 9, 1967, in Finance Docket No. 21510 et al., as modified by its orders dated August 10, 1967, and September 1, 1967. The judgment of the district court dismissing B&M's intervening complaint was entered on October 19, 1967. Notice of this appeal was filed in the United States District Court for the Southern District of New York on November 1, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by section 1253 of Title 28, United States Code.

STATUTES INVOLVED

The statutes involved in this case are: the Interstate Commerce Act, § 5(2), 49 U.S.C. § 5(2); the Judicial Code, 28 U.S.C. §§ 1253, 1336, 2101(b), 2284, and 2321-25; the Administrative Procedure Act, §§ 5(b), 7(c), 8(b), 10(a), (c), (d), and (e), 5 U.S.C. §§ 554(c), 556(d), 557(c), 702, 704, 705, 706. The text of those statutes is attached hereto as Appendix A.

QUESTIONS PRESENTED

1. Did the district court err in sustaining the Commission's Supplemental Report and Order of June 9, 1967, inasmuch as that order directs the inclusion of B&M in the N&W system on terms and conditions which erroneously fail to take into consideration the savings and traffic gains which the N&W system will realize as a result of B&M's inclusion therein?

2. Did the district court err in failing to remand the proceedings to the Commission for further hearing and consideration on the grounds that the Commission, despite the fact that it based its finding that B&M's inclusion in the N&W system is in the public interest upon subsidiary findings that specific efficiencies, consolidations, and sav-

ings would occur, erroneously failed to give B&M credit for those consolidations, efficiencies, and savings in determining B&M's value?

3. Alternatively, did the district court err in failing to remand the proceedings to the Commission with the direction that the Commission deny B&M's petition for inclusion in N&W on the ground that the Commission failed to prescribe terms of inclusion which were equitable to B&M and its shareholders?

STATEMENT

For more than a century and a third Boston and Maine and its predecessor railroads have engaged as common carriers by rail in interstate commerce in New England. B&M presently conducts freight operations in Maine, New Hampshire, Vermont, New York, and Massachusetts. Its passenger operations are now limited essentially to the Boston metropolitan area and are conducted under an avoidable cost contract with public authority. In prior years, B&M operated an extensive inter-city passenger service in a five-state area. Unfortunately, the toll of affording that public service long after the public ceased to utilize it was a heavy debt structure. In the words of the Presiding Officer below, "B&M has been bled white by huge passenger deficits over the past ten years." [1]

B&M enjoys a strategic geographical location. It originates or terminates the greatest part of its traffic and accordingly is in a relatively strong position to influence that traffic with respect to the choice of the carrier beyond. It is the only railroad serving many communities in its territory. It has faced the same problems which have plagued the smaller carriers on the Eastern seaboard including an imbalance in per diem charges for off-line

[1] Recommended Report and Order, F.D. No. 21510, December 22, 1966, p. 147.

cars and the high cost of being a terminating railroad in a heavily populated area without the offset of a substantial long haul. Yet B&M has survived. It has continued to render the services the Commission has on two recent occasions [2] found to be essential and necessary in the public interest, and it has avoided the bankruptcy which has befallen two of the other small, similarly-situated eastern carriers, the Central Railroad of New Jersey and the New Haven.

As a small independent line B&M realized early in the eastern rail merger movement the necessity of its inclusion in one of the large evolving merged systems. B&M applied first for inclusion in the N&W system at the time [3] when N&W was successfully seeking to merge with Nickel Plate and to lease the Wabash, and also to acquire several smaller lines. Despite N&W's assertions to the contrary,[4] inclusion in the N&W system has always been B&M's first choice. B&M's initial petition for inclusion was denied, as was that of D&H, because E-L had withdrawn its petition for inclusion in N&W. Without E-L, the lines of N&W were not contiguous with those of D&H and B&M.[5] The Commission's order denying B&M's petition was qualified, however, by Appendix "O" thereto which gave B&M, D&H, and E-L the right to petition for inclusion in N&W within five years, and provided that, if B&M inclusion in N&W were found to be in the public interest, said inclusion would be directed upon equitable terms. N&W's consummation of its merger with Nickel Plate and the concurrent lease of Wabash and acquisition of several smaller lines constituted irrevocable assent by

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[2] 330 I.C.C. 793.

[3] 324 I.C.C. 1, 30 (1964).

[4] N&W Jurisdictional Statement, Norfolk and Western R. Co. v. United States, No. 779, October Term, 1967, p. 21.

[5] 324 I.C.C. 1, 30 (1964).

N&W to including B&M on that basis, although N&W was guaranteed judicial review of any order directing B&M's inclusion.[6]

The evolving merger situation prompted B&M to petition also for inclusion in the Penn-Central system. After the Hearing Examiners ruled favorably on the Penn-Central applications, but recommended against B&M inclusion, B&M again began its earnest attempt to negotiate inclusion in N&W. Although a B&M-N&W meeting was held in the summer of 1965,[7] no progress was made for reasons which became obvious on September 1, 1965, when N&W announced the successful conclusion of highly-secret merger negotiations with C&O-B&O, and made an offer, with many conditions precedent, to include B&M (and also D&H, E-L, CNJ, and Reading) in the N&W-C&O system. The price N&W proposed for B&M was one share of N&W stock for ten shares of B&M common stock. B&M shareholders were not to receive N&W stock until they had held the stock of a holding company named "Dereco" for five years. Shortly after N&W's announcement, its chief executive officer bluntly told officials of B&M, D&H and E-L that the offer was a "take it or leave it" proposition.[8] Unfortunately, that same ten-to-one ratio was adopted by the Commission in the order here appealed from. N&W's figure substantially undervalued B&M and, as will be shown herein, the Commission committed legal error in adopting it.

B&M initiated further proceedings before the Commission on September 23, 1965, with the filing of its petition for inclusion in the N&W system pursuant to the provisions of Appendix "O." E-L and D&H filed similar

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[6] Id. at 148.

[7] B&M Opening Brief before the Commission, September 19, 1966, pp. 2-3.

[8] Ibid.

petitions shortly thereafter. B&M's brief in the court below described those proceedings in some detail.[9]

It is important to note at the outset that B&M sought *merger* with N&W.[10] Furthermore, B&M consistently argued that it would be entitled to be credited with savings and traffic gains of merger magnitude in the calculation of its worth to the N&W system, even if it should initially be included therein as a subsidiary under control, for the reason that fully-merged operations would eventually be brought about by N&W. B&M requested inclusion on the basis of an exchange of stock at the ratio of .41849 of a share of N&W common stock for each share of B&M common, and a corresponding ratio for B&M 5% convertible preferred stock.[11]

The Commission's final order directs B&M's inclusion through one hundred percent stock control of B&M as a subsidiary of N&W. Central to the error committed by the Commission is the fact that stock control can be exercised in many different ways, ranging from a relationship in which the controlled subsidiary railroad operates with virtual autonomy entirely separate from the operation of its parent to a relationship in which the parent achieves the maximum integration of the subsidiaries' operations into its own operations and those of other subsidiaries.

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[9] B&M Brief, S.D.N.Y., 67 Civ. 2451, September 5, 1967, pp. 6-11.

[10] 330 I.C.C. 783; Recommended Report and Order, December 22, 1966, F.D. No. 21510, p. 141.

[11] N&W stock closed at 92¼ on November 15, 1967. At that price, B&M's requested exchange ratio would amount to approximately $38.61 per share of B&M common. The Commission's one-for-ten ratio would amount to an evaluation of $9.23 per share for B&M common, a figure which must be discounted for the five-year delay before B&M shareholders could exchange Dereco shares for N&W shares. B&M common closed at 19 on November 15, 1967. The price quotations here are from the Wall Street Journal, November 16, 1967, p. 32.

In the expedited hearings before the Commission, the three petitioners, B&M, D&H, and E-L, all retained the services of an expert witness, William Wyer.[12] Mr. Wyer testified for B&M, D&H, and E-L on the magnitude of savings which would result from "four-way" merger of N&W, B&M, D&H, and E-L.[13] He testified in behalf of B&M on the amount of savings and traffic gains available from a two-way B&M-N&W merger,[14] and gave similar testimony for D&H. He also testified for all three petitioners with respect to traffic gains which would flow from four-way merger.[15]

Regarding the situation which would result upon N&W *stock control* of the three petitioners as subsidiaries, Mr. Wyer's role was different. He did not testify in behalf of E-L as to savings which would result from N&W control of E-L on the two-way or the four-way hypothesis.[16] In a very limited sense, he did testify for D&H and B&M with respect to the savings which would result from their control by N&W. But he did so on his expressed assumption that under a control arrangement savings would be limited to those resulting from the consolidation of the traffic solicitation forces of D&H and B&M with those of N&W.[17]

B&M's appeal arises because of the discrepancy between the explicit assumption of Mr. Wyer and the findings of the Commission as to what a control arrangement would mean. For reasons he stated, Mr. Wyer assumed that

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[12] See B&M Brief, S.D.N.Y., 67 Civ. 2451, September 5, 1967, pp. 9-11, for a more detailed explanation of Mr. Wyer's role.

[13] E-L Statement No. 7, p. 32 et seq.

[14] B&M Statement No. 7, p. 4 et seq.

[15] E-L Statement No. 7, p. 45 et seq.

[16] Id. at 42, 43. E-L's witness for this purpose was a member of its management.

[17] D&H Statement No. 3, pp. 20-23; B&M Statement No. 7, pp. 10-11, as corrected.

virtually no savings would result from control. His testimony as to merger was predicated upon the maximum integration of operations. Therefore, his testimony sets forth the two poles with regard to possible savings.

Mr. Wyer testified that B&M's allocable share of savings which would result from "four-way merger" would amount to $3,092,567 per year in net income.[18] Those savings fall into two principal categories 1) coordination of operations and equipment repair facilities including abolition of separate purchases and stores departments, and 2) reduction of administration expenses.[19] In sharp contrast, Mr. Wyer testified that he could not assume that if N&W controlled B&M any savings whatsoever could be made other than through the consolidation of the traffic solicitation forces of N&W, D&H and B&M (but not E-L) in the case of four-way control, or of N&W and B&M in the case of two-way control.[20] The total savings available through the coordination of those forces in the case of four-way control would be only $328,471.[21] Similarly, with respect to traffic gains Mr. Wyer testified that upon four-way merger, B&M would contribute an annual gain in net income of $1,722,313.[22] In contrast, the Commis-

[18] See B&M Opening Brief before the Commission, September 19, 1966, F.D. No. 21510, p. 40, for an explanation of how the figure was arrived at. This figure does not contemplate allocations of all savings to B&M. Rather, Mr. Wyer allocated savings in proportion to each railroad's contribution to them. See E-L Statement No. 7, Part III, for a description of the allocation process.

[19] E-L Exhibit No. 93, as corrected.

[20] E-L Statement No. 7, pp. 42, 43; D&H Statement No. 3, pp. 20-23; B&M Statement No. 7, pp. 10-11, as corrected.

[21] 330 I.C.C. 857. This figure gives B&M credit for all such savings, instead of merely one-half thereof as recommended by the Presiding Officer.

[22] See B&M Opening Brief before the Commission, F.D. No. 21510, September 19, 1966 p. 40, for an explanation of the derivation of that figure.

sion's Supplemental Report credited B&M with only $717,-275, a figure which the Presiding Officer at the hearings extrapolated from the petitioners' traffic studies.[23]

John P. Fishwick, Senior Vice President of N&W and its principal policy spokesman, also testified in these proceedings before the Commission, and gave a description of N&W's approach to the question of how to operate a subsidiary. He did it in testimony which related not to the inclusion of B&M, D&H, and E-L in the existing N&W, but rather to the inclusion of those three plus Reading and CNJ in the "Dereco" system as part of a merged N&W-C&O system. Nevertheless, his testimony was given in the cause below and must be regarded as depicting the policies N&W would follow as a corporate parent in control of B&M. Mr. Fishwick stated:[24]

> "The Dereco combination alone will do much to meet the problems of competition, rehabilitation and reequipping. *The five Dereco lines would be operated as a single railroad.* Unified operations would permit both coordinations of existing facilities for improved service and the creation of new facilities which cannot be justified under existing conditions.
>
> "With all five Dereco lines operated as a single entity, for example, it would be possible to eliminate the interchange delays between these lines and to coordinate their freight car distribution, thus improving car utilization and supply and making possible faster and more efficient service. The combined operations of the Dereco lines, in conjunction with N&W-C&O, would make improved communications and computer applications feasible, and provide shippers with more complete traffic data and control. These combined operations would also permit the economic

[23] Recommended Report and Order, p. 50.

[24] N&W Exhibit No. 1, p. 21.

use of modern, efficient maintenance equipment in a coordinated normalized maintenance program, and the use of efficient methods for car and locomotive repair, and maintenance." (Emphasis added.)

Long after the hearings closed on August 10, 1966, and in fact after B&M's Exceptions to the Presiding Officer's Recommended Report and Order were filed on March 1, 1967, N&W gave many more details as to what it would attempt to do with B&M as a subsidiary under the control of the N&W-C&O system. It did so when it distributed to the parties involved in the N&W-C&O proceedings the testimony of the N&W witness Clarence Jackman.[25] His testimony dealt with a larger N&W merger, but it is perfectly clear that it accurately describes the approach of N&W to the matter of integrating the operations of B&M as a subsidiary. It is drastically different from the autonomous organization premise underlying Mr. Wyer's testimony. A partial list of the efficiencies and coordinations which N&W's own witness stated would be realized by N&W as a parent in control of B&M is set forth in the margin.[26]

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[25] N&W Exhibit No. 11 in F.D. No. 23832 (N&W-C&O merger proceedings), pertinent portions of which were attached as Appendix "C" to B&M's Petition for Reconsideration before the Commission which is part of the record before this Court.

[26] 1. Centralized control of operations of all five lines (E-L, D&H, B&M, CNJ, and Reading) through a single Chief Operating Officer;
2. centralized freight car distribution and utilization;
3. a combined engineering department under one chief engineer who will bring about;

(a) better use of railroad machines;
(b) reduced inventories, etc.;

4. a single purchases and stores department;
5. all heavy locomotive repair work for the five lines performed at one facility;
6. a single accounting department;

[Footnote continued on page 12]

In its Exceptions and in its Reply to Exceptions, B&M argued to the Commission that under N&W's approach to control B&M's operations would, in form or in substance, be merged with those of N&W, and therefore B&M was entitled to credit for savings and traffic gains of merger magnitude if included in N&W through stock control.[27]

The Commission in its order of June 9, 1967, found that B&M's inclusion in N&W as a subsidiary was in the public interest. The Commission's public interest finding was bottomed on its subsidiary finding that under control significant consolidations and efficiencies, and accordingly "substantial savings" [28] would be accomplished. In other words, the Commission accepted essentially the N&W-Fishwick-Jackman approach to control and rejected that of the witness for the three petitioners, William Wyer. As the Court below conceded, "the Commission seems indeed to have believed that control savings exceed those claimed by witness Wyer. . . ." [29] Yet, it did not give B&M credit for them. Instead, it credited B&M with only those sav-

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[26] [Continued]

7. a single general claim department;
8. a single public relations department;
9. a single personnel department;
10. a single labor relations department;
11. a single real estate department;
12. a single tax department;
13. a single finance department;
14. yard coordinations;
15. coordination of computer systems; and
16. coordination of piggyback operations.

[27] Exceptions of Boston and Maine Corporation to Recommended Report and Order on Further Hearing, March 1, 1967, pp. 18-21; Reply of Boston and Maine Corporation to Exceptions to Recommended Report and Order on Further Hearing, April 1, 1967, p. 10.

[28] 330 I.C.C. 794.

[29] App. B, p. 55, to Jurisdictional Statement of N&W, No. 779, October Term, 1967.

ings obtainable through consolidation of the traffic solicitation forces of N&W, D&H, and B&M.[30]

B&M's Petition for Reconsideration was denied on August 10, 1967. The Commission's order of June 9, 1967, as modified, was upheld by the U.S. District Court for the Southern District of New York on October 19, 1967. The Court concluded that the Commission "was not bound to attempt to price these [control savings] out into increased earnings without the aid of detailed evidence and B&M had not furnished this." [31] This appeal has followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. Having Found The Public Interest Would Be Served By The Inclusion of B&M in The N&W System On A Basis Involving Substantial Savings, The Commission Erred In Ignoring Those Findings In Determining The Value of B&M

The Commission found that "under N&W control, petitioners will be able to achieve substantial savings." [32] To describe the derivation of those savings the Commission listed:

1. "Unified management" of what are "now several separate companies operating independently," which will in turn make possible:
2. "joint routes of affiliated lines,"
3. "the prospect of single line service,"
4. "elimination of interchanges,"
5. "more flexible distribution of equipment."

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[30] The amount credited was $328,471, 330 I.C.C. 857, as opposed to the more than $3 million obtainable upon complete integration of operations. The wide gulf between those figures had a drastic impact upon the terms for B&M inclusion.

[31] App. B, p. 55, to Jurisdictional Statement of N&W, No. 779, October Term, 1967.

[32] 330 I.C.C. 794. This finding was made under the general heading "Public Interest", id. at 784, and under the subheading, "Advantages to petitioners and to the public."

The Commission amplified its findings as to benefits available under control stating: [33]

> "Such benefits will increase the petitioners' ability to preserve and improve their present services and meet the needs of the shipping public. Through expanded piggy-back operations, petitioners will be in a better position to meet the competition of motor carriers. Because many industries prefer to locate plants where a single-line through-route service will be available, more opportunities for industrial development will be created. As part of the large N&W system, the use of more modern equipment and facilities will be justified, resulting in greater efficiency, improved operations and better service to the public."

In its ultimate findings the Commission found:

> "[I]nclusion of the petitioners in N&W will strengthen railroad competition, enhance the adequacy of the transportation service provided by N&W as well as the three petitioners by opening new routes and instituting new service, *produce the economies and efficiencies inherent in single line operation, and permit the joint use, where possible, of facilities, equipment and routes.*" [34] (Emphasis added.)

The language just quoted demonstrates that the Commission explicitly based its findings as to the public interest on subsidiary findings that the expanded N&W system would substantially integrate the operations of its component subsidiaries. In contrast there is no Commission finding that B&M inclusion in N&W would be in the public interest if only the degree of coordination described by Mr. Wyer would take place upon B&M's inclusion. Indeed, it is questionable that the Commission would have found that four autonomous components in an N&W system, functioning with entirely separate organizations,

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[33] 330 I.C.C. 795.

[34] Id. at 827.

would be able to compete against a tightly integrated and efficiently organized Penn-Central system.

2. The Commission Erroneously Failed To Conform Its Findings As To Value With Its Findings That The Inclusion of B&M In The N&W System Is In The Public Interest

The Commission failed to arrive at an evaluation of B&M which substantially corresponded to its finding as to how N&W would operate B&M. This failure was not justified by the fact that B&M had proffered a witness who had sponsored in evidence two sets of figures, one relating to the savings and traffic gains which would result from the total integration possible under merger, and the other depicting the very minimal savings which would be available if B&M should come under the control of N&W while remaining a separate, virtually autonomous, organization. If the Commission had accepted Mr. Wyer's assumptions as to the nature of the control relationship between N&W and B&M, then it would have been justified in using his figures in evaluating B&M. However, the Commission rejected Mr. Wyer's concept of control and found that identified efficiencies and consolidations—and substantial savings—would be realized by N&W. Therefore, if the Commission's findings as to the nature of control are correct, its adoption of the Wyer control savings figures is erroneous.

The opinion below reveals that the district court misunderstood the sequence of proceedings before the Commission, for it stated: [35] "However, when it became apparent that merger was not in the cards for any of the three carriers, petitioners' witness Wyer presented testimony on the savings (and traffic gains) resulting from inclusion as

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[35] Appendix B, p. 53, N&W Jurisdictional Statement, No. 779, October term, 1967.

controlled subsidiaries." The fact of the matter is that what little Wyer said concerning control in behalf of B&M was submitted as part of B&M's original testimony which was distributed in the Commission proceeding prior to the initiation of hearings.[36]

3. B&M Had No Duty To Introduce Evidence of The Control Savings Which Might Be Realized Under Every Conceivable Degree or Variation of Control The Commission Might Find N&W Would Exercise

The Court below rejected B&M's objections to the Commission's failure to make its findings as to savings consistent with its findings as to the nature of control. It based that rejection on B&M's failure to give the Commission aid in that task by supplying detailed evidence. The Court below would require of B&M a degree of prescience which the administrative process should not demand of any party. B&M could not have known whether the Commission would agree with the Wyer assumptions as to control or with the N&W-Fishwick-Jackman approach to control under the circumstances of this particular case. Furthermore, in its Exceptions and Reply to Exceptions, B&M alerted the Commission to the significance of N&W's approach to control. B&M pointed out that Mr. Fishwick's testimony in this case demonstrated that N&W's approach to control would produce benefits approximating those of full merger, and B&M accordingly asked credit for the savings of full merger if the Commission should direct control.[37]

It is unreasonable to suggest, as the district court has, that under the circumstances of the proceedings before

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[36] B&M Statement No. 7; E-L Statement No. 7; D&H Statement No. 3.

[37] Exceptions of Boston and Maine Corporation to Recommended Report and Order on Further Hearing, March 1, 1967, pp. 18-21; Reply to Exceptions of Boston and Maine Corporation to Recommended Report and Order on Further Hearing, April 1, 1967, p. 10.

the Commission, it was appropriate for B&M to come forward with detailed evidence as to the savings which would be realized under some intermediate degree of integration of operations. When the Commission took this case under consideration B&M was still seeking merger with N&W, and requesting alternatively that if a temporary period of control were directed, or if control were directed on the basis suggested by Mr. Fishwick, B&M be credited with full merger savings and traffic gains.[38]

In the Wyer testimony, the Commission had before it the two poles of predictable savings. Since it apparently rejected B&M's position that the Fishwick testimony justified giving B&M merger savings upon inclusion by control, the Commission with its expertise should have calculated the approximate value of the substantial control savings which it *found would occur*. If it felt the record was inadequate, the Commission should have asked the parties to submit more detailed evidence in view of its substantial acceptance of the N&W-Fishwick-Jackman approach to control.

It is fair to observe that in another portion of its report in these proceedings, the Commission showed great ingenuity in arriving at such estimates with respect both to the losses of traffic which the N&W might experience upon the consummation of the Penn-Central merger and the extent to which inclusion of petitioners would reduce those losses.[39]

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[38] Ibid.

[39] 330 I.C.C. 807 et seq. Starting with N&W's estimate of the extent to which it would experience losses of traffic to Penn-Central despite petitioners' inclusion, the Commission arrived at figures (which B&M does not challenge here) representing the amounts of traffic which Penn-Central would take away from N&W without inclusion of the three petitioners.

B&M does not challenge the Commission's findings that the petitioners' inclusion will save for N&W the significant amounts of traffic described in the report. B&M merely cites those findings as evidence of how the Commission was able and willing in this very proceeding to apply its expertise to the evidence before it to come up with approximate dollar figures which it used to support essential subsidiary findings. In the case of the traffic findings just referred to, it was important that the Commission make such findings in order to show the overall reasonableness of its rationale for solving the problems presented by the eastern rail mergers. It was equally important that the Commission take similar steps with regard to B&M's contribution to N&W. As N&W's Jurisdictional Statements in Nos. 778 and 779 clearly show, N&W obviously regards as an "Achilles heel" the Commission's failure to arrive at terms for inclusion of B&M which, in N&W's opinion,[40] have any prospect of being accepted by B&M shareholders. N&W obviously feels that this particular failure on the part of the Commission affords N&W with its best means of delaying further the Penn-Central merger and a resolution of the New Haven problem while N&W 1) enjoys the fruits of its already-accomplished consolidation with Nickel Plate, Wabash, and other smaller lines, and 2) attempts to push through its own super-merger with C&O-B&O. N&W would not be in a position to employ this strategy if the Commission had evaluated B&M consistently with its finding that "substantial savings" would be realized.

While the discussion here deals chiefly with the magnitude of the Commission's error with respect to savings, the same failure to take cognizance of its subsidiary find-

[40] B&M's Board of Directors has not submitted the Commission's terms of inclusion to B&M shareholders nor has it formulated any recommendations thereon. It will not take either step until a final judicial decision has been reached.

ings with regard to N&W control had a serious effect also upon the Commission's findings as to traffic gains.

In the final analysis, it is not the testimony of Mr. Wyer, or Mr. Fishwick, or Mr. Jackman, against which this Court should measure the accuracy and logic of the Commission's ultimate finding as to B&M's value. It is against the Commission's own findings, based on evidence of record, that "substantial savings" will be available through specified unifications and consolidations which it found would accompany the control it directed in the public interest. An ultimate finding of the Commission cannot stand on judicial review if it does not conform substantially to the agency's conclusions upon the subsidiary facts. *Chicago, R.I.&P. Ry.* v. *United States*, 284 U.S. 80, 96, 100 (1931). The Commission's basic or subsidiary findings must support its ultimate findings rather than conflict with them as they do in these proceedings. *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 533 (1946). See also *Michigan Consol. Gas Co.* v. *F.P.C.*, 108 U.S. App. D.C. 409, 283 F.2d 204, 218 n. 41, *cert. denied*, 364 U.S. 913 (1960), and cases cited therein.

B&M argued alternatively before the Commission and the district court that since the Commission did not agree with B&M that the record required an evaluation of B&M greater than the one-to-ten N&W-B&M stock exchange ratio assigned by the Commission, it should have denied B&M's petition for inclusion in the N&W system on the ground that terms equitable to B&M and to its shareholders could not be found on the record made before the Commission. B&M continues to urge the validity of that point upon this appeal.

CONCLUSION

B&M does not challenge or disagree with the findings of the court below with respect to the inclusion of D&H and E-L in the N&W system. Therefore, B&M urges that

this Court affirm the ruling of the court below which sustains the action of the Commission with regard to the inclusion of D&H and E-L in the N&W system; that it reverse the order of the Commission insofar as it relates to B&M; and that it remand the proceedings to the Commission for limited further hearings for the purpose of adjusting upward the Commission's findings as to the terms for B&M inclusion to make them consistent with the Commission's findings as to the type of control N&W would exercise. In the companion case of *Baltimore & Ohio R. Co.* v. *United States*, No. 778, B&M takes the position [41] that the order of the court below affirming the order of the Commission should be sustained by this Court in all respects. Therefore, the action suggested by B&M herein will not entail further delay of the Penn-Central merger and accordingly will not aggravate the situation of the New Haven.

For the reasons set forth herein, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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[41] B&M's position as to consummation of Penn-Central will be set out in detail in pleadings to be filed in No. 778.

APPENDIX A

INTERSTATE COMMERCE ACT

Section 5(2), 49 U.S.C. § 5(2).

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)

of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the finding specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving

a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employees was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any car-

rier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

JUDICIAL CODE

28 U.S.C. § 1253.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1336.

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. § 2101(b).

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

28 U.S.C. § 2284.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit,

who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the

rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appear that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

28 U.S.C. § 2321.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalites and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

28 U.S.C. § 2322.

All actions specified in section 2321 of this title shall be brought by or against the United States.

28 U.S.C. § 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

28 U.S.C. § 2324.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

28 U.S.C. § 2325.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commis-

sion shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

ADMINISTRATIVE PROCEDURE ACT

Section 5(b), 5 U.S.C. § 554(c).

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

Section 7(c), 5 U.S.C. § 556(d).

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Section 8(b), 5 U.S.C. § 557(c).

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(a), 5 U.S.C. § 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(c), 5 U.S.C. § 704.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly

required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Section 10(d), 5 U.S.C. § 705.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Section 10(e), 5 U.S.C. § 706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

FILED
NOV 17 1967
JOHN F. DAVIS, CLE

No. 834

Supreme Court of the United States

OCTOBER TERM, 1967

READING COMPANY,
Appellant

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF READING COMPANY

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No. .....

Supreme Court of the United States

OCTOBER TERM, 1967

READING COMPANY,

Appellant

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Reading Company appeals from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellant's complaint insofar as it requested that certain orders of the Interstate Commerce Commission be modified so as to include provisions which will adequately protect Reading from the adverse effect of the merger of Pennsylvania Railroad Company and New York Central Railroad Company pending Reading's inclusion in a major railroad system. This Statement will show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are so substantial as to require plenary consideration.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Southern District of New York is not yet reported. A copy of the opinion is attached as Appendix B to the Jurisdictional Statement of appellants Baltimore and Ohio, et al. (Oct. Term 1967, No. 778), and reference is made thereto. An earlier decision of the same District Court denying an interlocutory injunction in this case, *Erie-Lackawanna R. Co.* v. *United States,* 259 F. Supp. 964 (S. D. N. Y. 1966), was reversed by the Supreme Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967). The report and order of the Interstate Commerce Commission dated June 9, 1967, issued subsequent to the remand from the District Court, are reported at 330 I. C. C. 328. The Commission previously issued reports and orders dated April 6, 1966, and September 16, 1966, disposing of substantive aspects of the merger transaction, which are reported at 327 I. C. C. 475 and 328 I. C. C. 304, respectively.

JURISDICTION

Reading Company brought this action under Title 5, U. S. C. § 1009, and Title 28, U. S. C. §§ 1336(a), 2284, and 2321 through 2325, to annul and set aside an order of the Interstate Commerce Commission dated April 6, 1966 (327 I. C. C. 475), as modified by the Commission's orders dated September 16, 1966 (328 I. C. C. 304) and June 9, 1967 (330 I. C. C. 328).

The order of the District Court dismissing the complaint was entered October 19, 1967. Notice of appeal was filed in that Court November 1, 1967. The jurisdiction of the Supreme Court to hear this appeal is conferred by Title 28, U. S. C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

Should the Commission be required to hear evidence, offered by a small railroad at the first opportunity, that its public transportation service will seriously deteriorate from heavy traffic losses caused by the merger of large competing railroads, when developments in the realignment of Eastern railroads, arising long after the commencement of the lengthy administrative proceedings, have prevented such small carrier from obtaining the protection which it had expected by timely inclusion in another major system?

Does a District Court have the right to sustain a ruling of the Commission on a different ground than that given by the Commission and to qualitatively evaluate and reject technical evidence which has not yet been considered by the Commission?

STATUTES INVOLVED

The statutes involved in this case are: Interstate Commerce Act, Section 5(2), 49 U. S. C. § 5(2); and Administrative Procedure Act, Sections 5(b), 7(c) and 10(e); 5 U. S. C. §§ 1004(b), 1006(c) and 1009(e). The relevant portions of the texts of these statutes are attached hereto as Appendix A.

STATEMENT

The sole objective of Reading in this appeal is to secure the opportunity, which the Commission so far has denied, to present evidence of the serious harm which Reading and its shippers will suffer from overpowering competition by the merged Penn-Central. The purpose of this excluded evidence is to obtain for Reading protective conditions similar to those in Appendix G which the Commission invented

to shield three other small railroads, E-L, D&H and B&M,* from Penn-Central, until they are taken into the economic shelter of a major rail system. Unless this is also done for Reading, the essential service provided by it to the public will deteriorate just as certainly as Reading's revenues will decline.

The relief which Reading seeks will not result in injustice to Penn-Central or to the other small railroads involved since Reading is not now seeking to have the merger postponed.

Reading operates a railroad system of 1,275 miles which provides daily commuter passenger service in the Philadelphia area and regular freight service in Eastern Pennsylvania, New Jersey and Delaware. As shown on the Map, Appendix B hereto, its lines are practically paralleled by those of PRR. Allentown and Bethlehem, Pa., are the only two communities of any size served by the Reading which are not also served by PRR; but even those two cities are served by a PRR subsidiary, Lehigh Valley. Of the fifty largest on-line customers of Reading there are only fourteen which are not also served by PRR or a subsidiary of PRR (Ex. No. FH48.) No other railroad will have more face-to-face competition with Penn-Central in its territory.

The extreme nature of the increased competition that Reading can expect from Penn-Central following the merger is best described in the Commission's own findings justifying the merger (327 I. C. C. at 491):

> "Shippers may expect numerous service advantages as a result of the merger. There will be single-line service between more points, with less route-circuity, less handling of freight, less switching

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*Abbreviations are those used in the Commission reports and the District Court opinions.

> of cars, and consequently less likelihood of damage, less time in transit and terminal, and easier tracing of shipments. Not only will applicants be able to offer shippers all the various kinds of equipment in their combined fleet, but also, by virtue of their monetary savings and improved financial situation as a result of the merger, they will be in a better position to augment the fleet with modern, more versatile and specialized equipment tailored to the specific needs of the shipping public. With this equipment more readily available across the merged systems and under unified control, applicants should be able to produce a more flexible car supply more closely attuned, time and location-wise, to the needs of commerce and industry in their area of service."

Despite this major competitive threat, Reading deliberately did not oppose the merger, nor did it originally offer evidence of the amount of traffic which it might expect to lose. Instead, it sought only imposition of the standard routing conditions which heretofore have been the usual protection accorded competing roads, and an order directing PRR to dispose of its holdings in N&W. It so limited its initial participation because it believed that the Eastern roads must merge to survive; that as a member of the C&O-B&O "family", it would soon be merged directly in that system;* and that then it would be able to compete effectively, with Penn-Central by offering the same or similar advantages in freight routing and facilities as Penn-Central. Reading did not foresee that later

*C&O controls B&O through ownership of more than 90% of its stock; B&O owns 38.22% of Reading's stock; and C&O has a right of first refusal to purchase an additional 10%. Reading controlled CNJ by ownership of almost 50% of its stock until CNJ went into reorganization on March 22, 1967.

C&O-B&O would develop a plan to merge into N&W which would indefinitely delay inclusion of Reading in a major system, or that the Commission would go so far as to order Penn-Central to guarantee the traffic and revenues of some small railroads while they were awaiting inclusion in a large system, as it did by imposing the Appendix G conditions.

The railroads that did introduce evidence of traffic diversion, such as B&M, EL and D&H, did so only in support of their petitions for inclusion in Penn-Central and not in anticipation of those conditions which, much to the surprise of everyone, finally emerged for the sole benefit of B&M, EL and D&H, the so-called "protected carriers".

Following that order, Reading petitioned to reopen the record so that it could introduce evidence of the amount of traffic that might be diverted by Penn-Central and asked that it also be considered a protected carrier if, after hearing, the Appendix G conditions were retained. It argued that it was surprised by the availability of such protective conditions, that contrary to its original expectations there was no immediate possibility of merger or even financial assistance for Reading, and that Reading could not withstand Penn-Central competition alone without such protection. It also asked that it be permitted to show the effects of the Appendix G conditions on it if it were not to be included as a protected carrier.

The Commission, in its order of September 16, 1966, denied Reading the right to show the diversionary effects of the merger on the ground that it was guilty of "laches" (328 I. C. C. 317-318). However, the Commission did order further hearings to consider modifications of Appendix G and to consider whether a form of capital loss indemnification should be imposed to compensate EL, B&M and D&H for any loss of capital value resulting from the Penn-Central merger (328 I. C. C. 327-328).

Reading* commenced this proceeding before the District Court to enjoin consummation of the merger until, *inter alia*, it had an opportunity to be heard concerning the competitive injury it would suffer if the merger were consummated. Reading's suit was only one of many appeals which sought to enjoin the merger. The District Court denied all motions for an injunction, and on appeal this Court reversed on the sole ground that it was necessary that the future of the three protected railroads and their inclusion in a major system be decided prior to consummation of the merger (386 U. S. at 390). This Court declared that it was not deciding "the peripheral points posed by the various parties" (p. 378). However, it was evident that this Court also expected that these points would either be eliminated by the course of action that was being prescribed or that the Commission itself would correct them. It was said (386 U. S. at 390):

> "Furthermore, the serious charge that the conditions of Appendix G were imposed without notice and hearing would in a large part be dissipated by this course of action. As to the three protected roads it would be entirely obviated if and when their fate is determined. *As to the other railroads affected,*

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*Reading and CNJ joined in the same complaint before the District Court (66 Civ. 2914) and in the brief filed in this Court by appellants B&O, et al. CNJ entered reorganization proceedings on March 22, 1967 in the United States District Court for the District of New Jersey (C. A. No. B401-67) under Section 77 of the Bankruptcy Act (11 U. S. C. § 205). The Court below granted CNJ's motion to suspend the pleading, briefing and argument schedule as to it and has not dismissed its complaint (B&O J. S. Ap. B-71). CNJ had represented that, because it was negotiating protection with Penn and Central, it would not seek a stay of the merger but reserved its right to litigate its request for protection if negotiations are unsuccessful. Reading is not seeking a stay of the merger and its position is identical to CNJ's except that it must advance this litigation because it has been unable to negotiate protection.

the Commission could more quickly conclude its present hearing and make a decision as to the effect of the merger upon them and the protection, if any, required. (Emphasis supplied)

At the continued hearings in the fall of 1966, which were held while the appeals to this Court were pending, the Examiner struck from the testimony of Reading's witness all references to the diversion of Reading traffic by reason of the merger, confining the testimony to possible diversion by reason of the Appendix G conditions (Ex. No. FH48, as marked). Despite the expectations of this Court that the Commission would make a decision as to the effect of the merger upon the unprotected roads, the Commission affirmed the Examiner's exclusion of Reading's evidence in its final order of June 12, 1967, saying that Reading "failed to present timely evidence of the impact of the Penn-Central merger." (330 I. C. C. at 356).

The evidence which was excluded would have shown that 19.9 million dollars of Reading freight revenues out of a total of only 91.8 million dollars of freight revenues, or more than 21%, is susceptible of diversion to Penn-Central (Ex. FH 48 at p. 8). The overwhelming importance to Reading of an exposure of this magnitude is self-evident from the fact that 1965 was the first year since 1960 that it had a profit. Its losses had been: 1961-$6,257,000; 1962-$4,917,000; 1963-$6,486,000; 1964-$5,396,000. In 1965 its profit amounted to $2,940,000; but in 1966 earnings dropped to $1,700,000; and for the first nine months of 1967 there has been a loss of $5,536,000. It is obvious that Reading cannot afford to lose another dollar of revenue.

On April 5, 1967 Reading had filed with the Commission at Finance Docket No. 23178 (a proceeding by C&O-B&O for control of WM) a petition for reconsideration

of the Commission's order of March 6, 1967* permitting C&O-B&O to control WM. The petition requests an order that C&O-B&O be required, as a condition to permitting such control, to render such support as may be required to keep Reading economically viable until it has been merged into C&O-B&O or one of the other major Eastern systems.

The petition, which is a part of the record in this appeal and is printed as Appendix C hereto, recites that Reading can no longer rely upon C&O-B&O for support in meeting the competition of Penn-Central since C&O-B&O has made it clear that Reading's only hope of merger lies in the so-called Dereco Plan, in which B&M, EL, D&H, Reading and CNJ would be included in N&W-C&O if the two latter companies are allowed to merge, and that Reading can expect no help from C&O-B&O in any other way. In the public announcement on August 31, 1965 of the proposed N&W-C&O merger, C&O-B&O said that there was no obligation to include Reading and CNJ in its system, and that acting alone C&O could not work out any practicable plan for their inclusion; in their brief in the *Inclusion Proceedings* C&O-B&O stated that consummation of the N&W-C&O merger and the Dereco Plan "offers the only solution to Reading-CNJ problems that can now be foreseen"; and in the testimony of the President of C&O-B&O in the N&W-C&O merger case he stated that the Penn-Central merger will seriously curtail, if not eliminate, the ability of C&O-B&O to provide any further assistance to Reading and CNJ. (App. C., pp. C-3-C-5). It was pointed out that the accuracy of those statements was confirmed by the fact that CNJ's financial condition did deteriorate to the point that CNJ had to initiate reorganization proceedings under Section 77 of the Bankruptcy Act on March 22, 1967. As was stated in

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**Chesapeake & Ohio Ry. Co.-Control-Western Maryland Ry. Co.*, 328 I. C. C. 684 (1967).

Reading's petition (Appendix C, p. C-9): "While Reading advocates the N&W-C&O System as a necessary counterweight to Penn-Central, and as the *only* solution proffered so far to Reading's own efforts so survive and grow, Reading cannot risk withdrawal, disapproval or even the time necessary for approval of the N&W-C&O proposal."

In a still further effort to obtain protection, on April 18, 1967 Reading filed a petition for consolidation for decision of the Penn-Central Merger case, the Inclusion Proceeding, the WM Control case and the N&W-C&O Merger case. It was alleged that consolidation for decision is the only effective method of achieving a final restructuring of the Eastern rail systems without seriously harming or even destroying one or more of the small roads.

The Commission has not yet acted upon Readings petition to obtain C&O-B&O financial responsibility in the WM Control case *although it was filed seven months ago,* and it has rejected Reading's petition for consolidation (330 I. C. C. 780, 792).

Following the Commission's order of June 12th, Reading filed a Supplemental Complaint in this proceeding, alleging as error, *inter alia,* the refusal of the Commission to hear and consider the evidence showing the disastrous effect of the merger on Reading and the approval of the merger without imposing for the benefit of Reading conditions similar to those in Appendix G pending inclusion of Reading in a major rail system.

The District Court dismissed the Complaint on the grounds, *inter alia,* that the Commission is not bound to reopen a proceeding "whenever management has a second thought", that it is hard to believe that B&O will actually let Reading "disappear", and that if Reading's other stockholders are injured by actions dictated by B&O "they are not without remedy." (B&O J. S. at B-21-22).

This appeal has followed, but Reading is not seeking to stay the Penn-Central merger in the expectation that this Court will direct that the protective indemnity condition, if any is found to be appropriate, be made retroactive to the date of the merger. Reading has always recognized that this merger as such is in the public interest and it believes that further proceedings with respect to its own problem can be concluded swiftly.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The questions presented on this appeal are so substantial as to require plenary consideration by this Court because they raise serious issues concerning the Commission's performance of its statutory duties in approving the largest railroad merger in history.

The Commission has been unwilling to allow consummation of the merger unless the merged company agrees to comply with the extraordinary conditions which it has devised for the protection of all affected small railroads, except Reading and CNJ, prior to their inclusion in a major system. Because Penn-Central is now negotiating to include CNJ in its system under certain conditions, Reading, alone among small Eastern railroads, is without any assurance as to its ultimate fate.

Appellant provides rail service to thousands of passengers in suburban Philadelphia and to shippers in the key metropolitan centers in Eastern Pennsylvania, New Jersey and Delaware. At virtually all points, it will compete directly with the enlarged and modernized freight service which will be provided by Penn-Central. Substantial deterioration of Reading's service through loss of business to Penn-Central—let alone its "disappearance"—would alter the quality and nature of the system of transportation

available to important segments of the public. The questions at issue on this appeal bear significantly on the future of that service.

The rejection of the evidence that would disclose this effect upon the public service, and provide a basis for according Reading protection similar to that afforded other small roads, raises substantial questions under the Interstate Commerce Act and the Administrative Procedure Act.

I. The District Court erred in upholding the Commission's refusal to consider the public's interest in the adequacy of Reading's service.

The Commission held that Reading is "bound" by its "original concession that the effect of the merger transaction (without the indemnity conditions) . . . would be inconsequential"* (330 I. C. C. at 357); and the District Court affirmed *inter alia* on the ground that the Commission is not "obliged to reopen a proceeding whenever management has a second thought" (B&O J. S. at B-21). Thus, both the Commission and the District Court would bind the public merely by the initial position assumed by a railroad at the beginning of a lengthy trial and without regard to intervening events.

The refusal to hear evidence concerning the effects of the Penn-Central merger upon Reading because it was not offered early in the proceedings constitutes a violation of

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*The Commission's reference to a "concession" is actually a reference to Reading's limited participation in the proceedings before the Commission in its initial stages. Reading originally announced on the record that it would be satisfied if it were protected by the standard protective conditions previously imposed by the Commission in similar cases and by a requirement that Penn divest its interest in N&W. It should be understood that Reading at no time said to the Commission or to anyone else that the merger's effects would be inconsequential.

the specific injunction of Section 5(2)(c) that the Commission give weight to "the effect of the transaction upon adequate transportation service to the public" and to "the effect upon the public interest of the . . . failure to include other railroads in the territory involved in the proposed transaction" (49 U. S. C. § 5(2)(c)). By rejecting this information, the Commission refused to consider whether the public in Reading's territory will be adequately served after this merger. Because of the same deficiency, the Commission is unable to fulfill the legislative policy whose end is the preservation of a national transportation *system* adequate to meet the commercial needs of the nation.

The clear statutory duty of the Commission is to consider the effects of this merger upon *every* railroad involved regardless of whatever position may be taken by the railroad on the record. This is an *affirmative* administrative duty—the Commission does not sit as a judge merely weighing the record made by the parties—it is a participant in the proceedings on behalf of the public and, far from rejecting the proffered evidence of harm to Reading's service, it should have insisted upon its production if it had not been offered. (See the thorough discussion of the Commission's duty in this respect in Mr. Justice Brennan's Concurring Opinion in *Baltimore & Ohio,* 386 U. S. at 427-430.)

The District Court's characterization of Reading's current position as a "second thought" supported by "evidence that had been available all along" not only ignores the public interest but incorrectly implies that Reading has been inconsistent (B&O J. S. at B-21). The participation of Reading throughout this proceeding has always been consistent with its view that protection from a merger so vast can only come from inclusion in a large system.

Before 1965 Reading had every reason to expect that the adverse effects of the Penn-Central merger on the pub-

lic served by Reading would be offset by its inclusion in C&O-B&O at or before the birth of Penn-Central. As the Commission has found, Reading is a "family line" of C&O-B&O. *Chesapeake & Ohio Ry. Co. and Baltimore & Ohio R. Co.—Control—Western Maryland Ry. Co.*, 328 I. C. C. 684, 706-708. Reading had long expected that in the restructuring of Eastern railroads it would be merged early into the B&O operation. A significant change, however, started to occur with the announcement on August 31, 1965 of the proposed N&W-C&O merger (Finance Docket No. 23832). This proposal contemplates the inclusion of Reading only as a part of a package consisting also of EL, D&H, B&M and CNJ, the Dereco Plan. The sense of insecurity which this announcement created increased when C&O-B&O representatives publicly stated in 1965 and 1966 that the Dereco Plan offers the only solution "to Reading problems"; that the Penn-Central merger would "seriously curtail, if not eliminate" C&O-B&O assistance to Reading; and that the N&W-C&O merger is essential "if there is to be any reasonable hope" of preserving Reading's service (App. C, at C-3-C-6). Any remaining hope of security because of a "family" relationship was dispelled by CNJ's bankruptcy.

It is now abundantly clear that C&O-B&O will not voluntarily include Reading in its system or render it financial assistance until there is a final decision in N&W-C&O which may be years away. Moreover, the Commission has failed to act on Reading's petition to compel C&O-B&O to keep it economically viable pending merger and has refused Reading's petition to consolidate all those proceedings for decision.

The District Court observed that B&O "naturally will do everything possible to exploit its lack of obligation to include Reading . . . to forward the N&W-C&O merger"

(B&O J. S. at B-22). The Court was not disturbed by what it perceived because of its confidence that Reading's independent stockholders could redress any resulting damage to their interests. But this case does not involve the rights of independent stockholders. The issues here concern the effect on the public interest if Reading's financial position so deteriorates from unrestrained Penn-Central competition that its service also deteriorates. Whatever remedies may be available to stockholders in judicial proceedings, it is only the Commission which can protect the public.

In rejecting Reading's position that the issues relevant to the public interest must be explored irrespective of private equities, the District Court accorded validity to the principle but would not sanction Reading's reliance upon it. The Court distinguished *Udall* v. *F. P. C.*, 387 U. S. 428 (1967), in which this Court refused to affirm a finding that a power project was in the public interest until all issues relevant to the public interest had been explored, even though advanced late in the proceedings, by noting that the Secretary of the Interior, who had not been heard, "is an especially important representative of the public" (B&O J. S. at B-21). This rationale makes consideration of the public interest dependent on the identity of the public advocate—a precondition not found in the Interstate Commerce Act. The matters to be tested by the Commission here are the effect upon the public interest of the merger's impact on Reading's service and of the non-inclusion of Reading in this or other merger transactions.

The District Court also would preclude Reading from a hearing here because it believes that Reading would offer evidence "available all along" (B&O J. S. at B-21). This view misconceives the significance of the evidence offered. It is true enough that Reading throughout these proceedings would have been able to prepare studies and submit evi-

dence as to the effects of the merger transaction. But such evidence would not then have been relevant since Reading did not seek inclusion in Penn-Central as did the other small railroads and it was unaware of the fact that the Commission would fashion special conditions to protect and indemnify small railroads pending inclusion in a large system. Since Reading has always believed that the public interest will be best served by its inclusion in C&O-B&O, it was not until it appeared that such inclusion could not occur until long after the onset of harm from Penn-Central and that the Commission would make extraordinary interim protection available to small railroads, that it became appropriate for Reading to prepare and offer the evidence.

The Commission's initial lack of concern as to the ability of Reading to meet Penn-Central competition may be explained by possible reliance on the historic B&O-Reading "family" relationship and the protective implications that might flow from that relationship. However, when the Commission was informed that C&O-B&O would not voluntarily keep Reading economically viable and that Reading would be included only at a distant time into the N&W-C&O system, and then merely as one of a group of five small roads, the Commission's duty to explore the consequences to Reading of the increased competition from the merger became clear.

II. By refusing the evidence of the effect of Penn-Central competition on Reading the Commission failed to perform its duty with respect to the antitrust laws.

In its original opinion the Commission correctly held that its duty is to estimate the effects of the merger on competition and to endeavor to accommodate the policies of the antitrust laws with the national transportation policy, citing

McLean Trucking Co. v. *United States,* 321 U. S. 67 (1943) and *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173 (1959) (327 I. C. C. at 508). In this connection it said that inquiry must be made into the effects of "the increased competition the strengthened applicants will be able to exert against their present real competitors, and even against their present connections." (327 I. C. C. at 510).*

Quite obviously this duty of the Commission to balance the transportation benefits of a merger against the tendency of the merger to create a monopoly in any geographic area by overpowering competition, such as in the territory served by Reading, cannot be satisfied by arguing that the relevant evidence was offered too late. Indeed, it can be contended with some force that the Commission should have insisted upon the production of just such evidence despite Reading's initial assumption that it too would soon be merged. See *Baltimore & Ohio,* 386 U. S. at 435-437 (concurring opinion).

The national transportation policy of strong unified railroad systems and the antitrust policy of multiple competitive units can be reconciled in the case of the Reading, just as in the case of B&M, E-L and D&H, by the imposition of protective conditions pending Reading's inclusion in a major system which is itself competitive.

III. The Commission erred in rejecting the proffered evidence on the ground of laches, and the District Court erred in affirming the Commission on grounds different from that relied upon by the Commission.

The Commission rejected Reading's request for a hearing to introduce evidence of traffic diversion in its orders of

*The anti-trust standards do not control the decision of the Commission. *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965).

September 16, 1966 on the ground that Reading was "guilty of laches" (328 I. C. C. at 316-318) and again in its order of June 9, 1967 on the ground that Reading was bound by its original failure to introduce such evidence (330 I. C. C. at 357, 360).

This was error in that rulings on matters of public importance must be justified by "more than procedural grounds". *Chicago & N.W. R. Co.* v. *A., T. & S.F. R. Co.*, 387 U. S. 326, 362 (1967). In that case, which involved divisions of joint rates on transcontinental freight traffic, this Court dealt with the difference between procedure and substance in the disposition of claims involving the public interest. For example, the Denver & Rio Grande belatedly claimed that it should receive separate treatment but the Commission held that it was estopped from so doing because of a prior position which the railroad had taken. This Court held that: "Of course the Commission could not simply rest on such notions of estoppel to justify infliction of substantial injury upon an important railroad serving the public." (387 U. S. at 365). Nor can the Commission in this case rely upon laches, a concept peculiar to the assertion of private rights, to justify the failure to protect the public served by an essential carrier.

The exclusion of relevant evidence can only be justified on the ground that no real injury to the public or a party has resulted therefrom. See, for example, *Pittsburgh Plate Glass Co.* v. *Nat. Labor Relations Bd.*, 313 U. S. 146 (1941); *Nat. Airlines, Inc.* v. *C. A. B.*, 321 F. 2d 380 (1963)

The District Court, perhaps in acknowledgment of the error made by the Commission, added what appeared to it to be substantive reasons; but in so doing it committed additional errors. The District Court expressed the opinion that it was "exceedingly hard to believe" that B&O would see

Reading "disappear"; it also argued that a letter from the President of Reading to the Commonwealth of Pennsylvania which had been introduced into evidence by the Commonwealth (Ex. H-109-A) supported "management's initial conclusion that the effect of the merger would be inconsequential" (B&O J. S. at B-21-22); and it even evaluated the rejected evidence and found it "scarcely persuasive" (Ibid).

A guiding principle of judicial review of administrative action is that the reviewing court must judge the propriety of the action solely on the grounds invoked by the agency. As this Court said in *S. E. C.* v. *Chenery Corporation,* 332 U. S. 194 (1947) to do otherwise "[w]ould propel the court into the domain which Congress has set aside exclusively for the administrative agency" (332 U. S. at 196). See also *Burlington Truck Lines* v. *United States,* 371 U. S. 156, 168-169 (1962). The District Court has done just that.

Any surmise by the District Court as to whether B&O will let Reading "disappear" finds no support in the Commission's report, and certainly not in the evidentiary record. Indeed Reading has asked the Commission to determine, after hearing, that C&O-B&O must protect Reading from the competitive threat ahead. *Western Maryland Control* (Appendix C hereto). But C&O-B&O has vigorously opposed this request and the Commission has not yet acted. Therefore Reading has no assurance of protection other than the District Court's guess.

The letter to the Commonwealth of Pennsylvania, which the District Court regarded as proof that the effect of the merger upon Reading would be inconsequential, was not so evaluated by the Commission. Instead the Commission adopted the Examiners' finding that there was "no way of assessing" the effect of the merger on Reading (327 I. C. C. at 481-82, Examiners' report at 302).

Likewise, the District Court overstepped its power in evaluating the diversion study. The persuasiveness of Reading's study is, under the statutory scheme, to be determined in the first instance by a body having intimate knowledge of the intricate rail transportation complex. The function of the appellate court is limited to a review of the agency determination by application of the normal judicial standards (5 U. S. C. § 1009(e)) which do not include the weighing of evidence within the expertise of the agency. See *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U. S. 57, 69 (1966).

An interpretation of a diversion study is a matter pecularily appropriate for the application of the Commission's expert judgment. Evaluation of such evidence involves much more than numerical computations. Nothing demonstrates this more clearly than the Commission's imposition of the Appendix G conditions for E-L and B&M notwithstanding its adoption of findings by the Hearing Examiners that E-L's estimates of diversion were "highly exaggerated, and lack the specific underlying detail necessary for complete evaluation" (p. 374), and that B&M's study "lacks the specifics necessary for us to make an intelligent appraisal", and "is wholly inadequate and founded on unrealistic assumptions and premises" (p. 360). In other words, although the diversion studies of E-L and B&M were unpersuasive, the Commission was convinced that those roads needed unprecedented protection. The Commission manifestly relied on its expert knowledge of rail competition when, despite the unconvincing studies of E-L and B&M, it concluded that it had seen enough to know that the merger would be totally disruptive to small, independent, competitive railroads. The lack of any challenge to the Commission's judgment demonstrates its soundness.

With all deference to the judicial expertise of the District Court, the initial evalution of Reading's studies should

be reserved to the administrative expertise of the Commission. If the Commission does no more than apply the same reasoning process to Reading's studies as it did to those submitted by E-L and B&M, it cannot fail to order protection for Reading.

Thus, the District Court has invaded the administrative field in disregard of both the law and the facts in an effort to find substantive grounds for the Commission's refusal, for purely procedural reasons, to hear evidence of public injury.

IV. Reading has been denied the full and fair administrative hearing required by law.

Since the proffered evidence as to traffic diversion is clearly relevant under the Interstate Commerce Act, both alone and in conjunction with the antitrust laws, the Commission's refusal to receive this evidence violated Sections 5(b) and 7(c) of the Administrative Procedure Act (5 U. S. C. §§ 1004(b) and 1006(c)) as well as Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. § 5(2)(b)).

The broad discretion conferred by Congress upon administrative agencies carries with it a corresponding obligation of strict adherence to due process. The breadth of an agency's discretion "places in a strong light the necessity of maintaining the essentials of a full and fair hearing". *Morgan* v. *United States,* 304 U. S. 1, 21 (1938).

When it excluded Reading's evidence, the Commission did not observe this standard. Rather, Reading has been continually confined within narrow procedural channels—in distinct contrast to the liberality of the Commission in its treatment of other small railroads affected by this merger. For illustration, when both protected and unprotected groups of carriers protested the imposition of the Appendix

G conditions without notice, the Commission held lengthy hearings on the conditions. The protected roads ultimately received "even stronger interim protection" (330 I. C. C. at 361), but Reading's proof was sharply proscribed and it was allowed to show only a relatively small part of the impact of the authorized transaction (*id.* at 357).

The Commission's denial of a hearing to Reading is also to be contrasted with the conditions imposed by the Commission for the Lehigh Valley Railroad, a subsidiary of PRR, notwithstanding its failure to participate in this or any other of the recent merger cases affecting Eastern railroads (327 I. C. C. at 554-55). Although this dissimilarity in the treatment of two small competing railroads affected by the merger was repeatedly called to the attention of the Commission and was also pointed out to the District Court, the Commission has not explained the distinction and the Court did not require it to do so.

Since the protection afforded by Appendix G in the Commission's report of April 6, 1966 (327 I. C. C. 475, 561) was unprecedented, Reading's plea to obtain that protection, made in its petition for reconsideration of that order, was timely and should have been granted. Cf. *Gilbertville Trucking Co.* v. *United States,* 371 U. S. 115, 130 (1962); *Silvano* v. *United States,* 119 F. Supp. 277 (W. D. Wash. 1954).

Even if Reading's attempt to be heard were—as it is not—a source of delay, administrative fairness requires a hearing. This Court, in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304-305, stated:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when

it has been reached with due submission to constitutional restraints. [Citing cases] Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. . . . The right to such a hearing is one of 'the rudiments of fair play' . . . . *There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored*" (Emphasis supplied)

In all events, the issue of delay has been mooted in this Court by Reading's willingness to be heard after consummation.

V. The District Court erred in affirming the Commission on the ground that the proceedings would have been delayed by granting Reading a hearing.

The District Court stated that "Administrative proceedings, especially of such complexity as this, would never end if parties remained free to take new positions at any time and seek to support them with evidence that had been available all along." (B&O J. S. B-21).

The statement as a generality is, of course, valid and has much to commend it. As already pointed out, however, this is not a case of the whimsical or dilatory adoption by Reading of a new attitude toward the merger. Nor is it a case where justice would be delayed by the grant of a hearing.

The first opportunity for Reading to address itself to the Appendix G conditions was in its petition for reconsideration of the Commission's order of April 6, 1966, and it seasonably did so on June 30, 1966. Four months later the Commission began hearings on the capital loss indemnity issue and shortly thereafter on the Appendix G conditions. Although Reading offered to show the effects of the merger upon it on each of these occasions, the Commission refused to hear the evidence. Months later, in March 1967, Reading offered to show how Penn-Central would affect it at the hearings being held by the Commission to fix protective conditions for Reading and other roads by reason of the inclusion of New Haven in Penn-Central. That evidence was again refused by the Commission's hearing examiner even though by that time this Court had decided *Baltimore & Ohio* and had observed that the Commission would as a result of the remand "more quickly conclude its present hearing and make a decision as to the effect of the merger upon [the unprotected carriers] and the protection, if any, required" (386 U. S. at 390). Had the evidence proffered by Reading on any of these occasions been heard, the Commission's decision of June 9, 1967 need not have been delayed at all.*

Moreover, the Commission or the District Court could have directed the hearing and evaluation of the evidence without staying the merger. There would have been then, just as there is now, sufficient protection for Reading in such procedure if any indemnity provision is made retroactive to the date of the merger.

---

*There have been 55 days of hearings since the Commission's order of April 6, 1966 first establishing Appendix G conditions.

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted and the case set down for a full hearing on the merits.

Respectfully submitted,

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MORGAN, LEWIS & BOCKIUS

APPENDIX A

Pertinent Provisions of Section 5 of the Interstate Commerce Act (Title 49 U. S. C. § 5).

§ 5(2)(a), (b), (c) and (d)

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to

the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give

weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

Pertinent Provisions of the Administrative Procedure Act.

§ 5(b), 5 U.S.C. § 1004(b)

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 7(c), 5 U.S.C. § 1006(c)

Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

* * *

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

§ 10, 5 U.S.C. § 1009

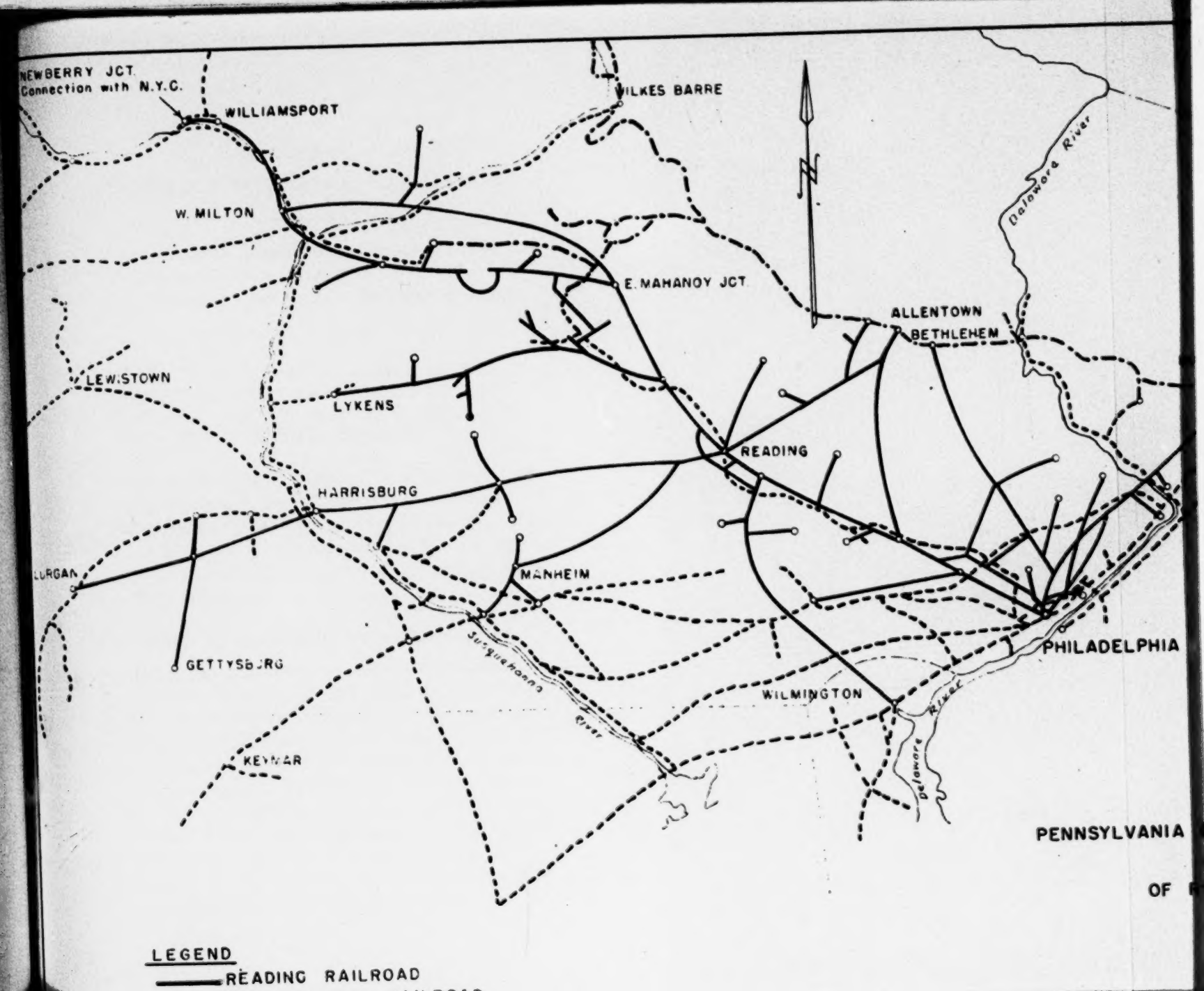
Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

* * *

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.


NEWBERRY JCT.
Connection with N.Y.C.
WILLIAMSPORT
WILKES BARRE
W. MILTON
E. MAHANOY JCT.
Delaware River
ALLENTOWN
BETHLEHEM
LEWISTOWN
LYKENS
READING
HARRISBURG
LURGAN
MANHEIM
PHILADELPHIA
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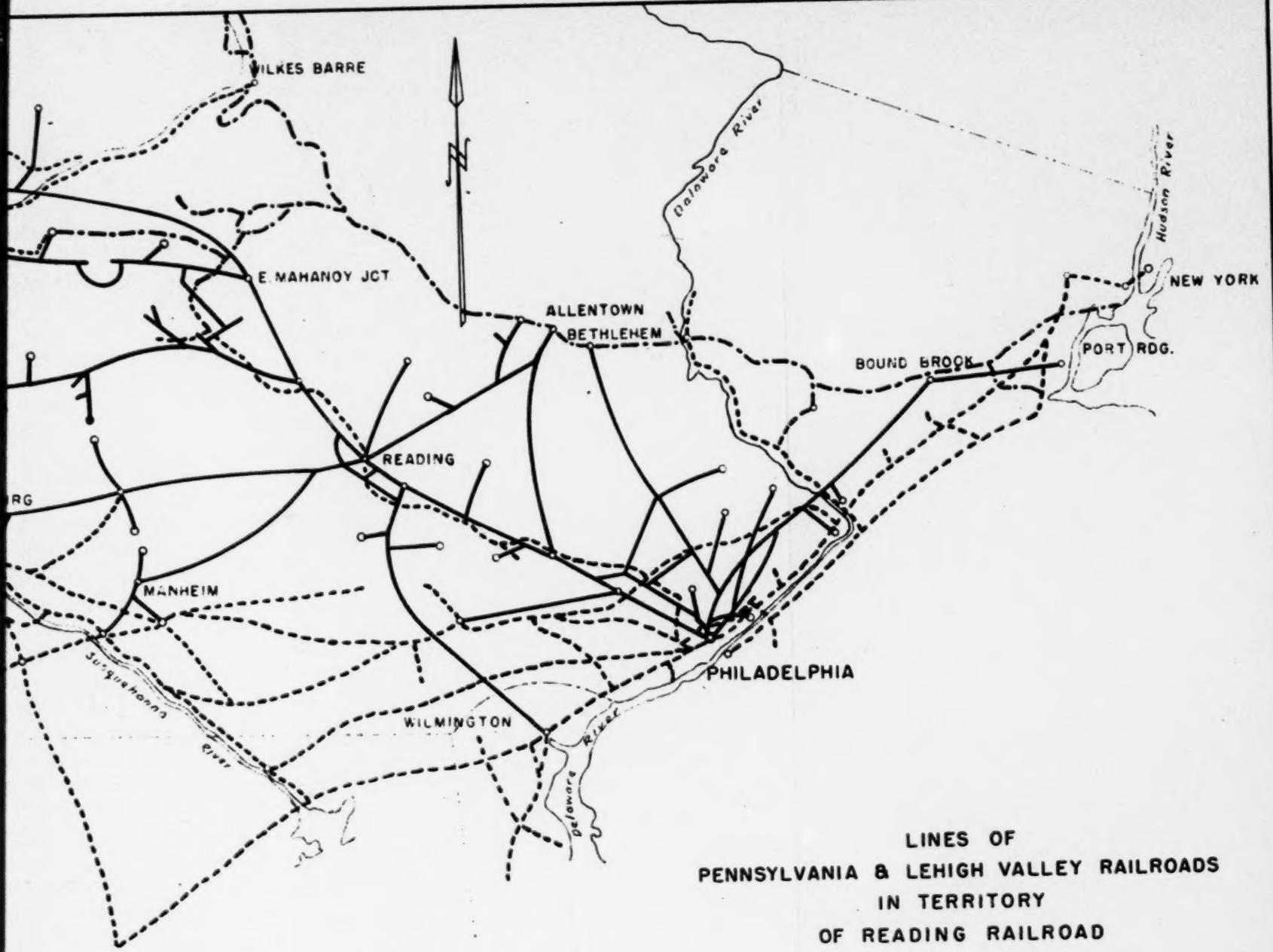

LINES OF
PENNSYLVANIA & LEHIGH VALLEY RAILROADS
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APPENDIX C

BEFORE THE

INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY AND
BALTIMORE & OHIO RAILROAD COMPANY—
CONTROL—WESTERN MARYLAND RAILWAY COMPANY

Finance Docket No. 23178

PETITION OF READING COMPANY FOR RECONSIDERATION OF REPORT OF THE COMMISSION SERVED MARCH 6, 1967 AND FOR FURTHER HEARING

COMES NOW Reading Company ("Reading") and files this petition requesting the Commission to reconsider its Report dated February 21, 1967, and served March 6, 1967 (328 I.C.C. 684), and to schedule further hearing for the purposes herein described. In support of its request, Reading represents as follows:

I. The Position of Reading in These Proceedings

Reading is an intervenor in these proceedings and, prior to this time, has sought only the imposition by the Commission of conditions to approval of the application which would protect its routes and channels of trade. The traffic conditions imposed by the Commission in Appendices E and F to its Report of February 21, 1967 provide such protection. However, events which have transpired since the conclusion of hearings, some quite recently, compel Reading to seek the additional relief herein requested.

At the time of the hearings in this proceeding the Eastern railroad merger movement was proceeding on the

basis of three systems-C&O-B&O, N&W-Nickel Plate-Wabash and Penn-Central.* Reading and CNJ as well as the Western Maryland were considered to be "family lines" of the C&O and B&O which would be taken into that system. In fact in March 1963 B&O had retained independent consultants to study B&O-Reading-CNJ relations from an economic standpoint, with a view to bringing the relationship closer through merger, lease or stock control. Following completion of the traffic flow phase of this study, B&O acquired in October 1963 additional shares of Reading stock which increased its holdings from 42.6 percent of the total outstanding stock to just short of 50 percent. C&O-B&O also supplied Reading with a president, financial vice-president and operating officers to help restore the Reading to a profitable basis and qualify it for inclusion in the C&O-B&O System. Reading management believed that it could look to C&O and B&O for interim support and ultimate merger independently of C&O and B&O's relationship with any non-family lines.

II. Circumstances Have So Changed That the Present Relationship Between C&O-B&O and Reading Does Not Assure Reading's Viability.

C&O-B&O have continued their substantial ownership interest in Reading. B&O now owns 38.22 percent of Reading stock and C&O has a right of first refusal to purchase an additional amount approximating 10 percent. The other relationships between C&O-B&O and Reading are generally as described in the Report (328 I.C.C. at pp. 707-708), but none of the financial transactions has

*Unless otherwise indicated, abbreviations of railroads are those used in the Commission's Report.

involved "advances" by B&O to Reading or its affiliates, as the Report incorrectly states (*id.* at p. 708). B&O is also Reading's most important traffic connection and Western Maryland and Reading are mutually dependent on each other for traffic (*id.* at p. 700; Examiner's Report, sheet 30).

Notwithstanding the close relationship of C&O-B&O and Reading, and Reading's previous expectations, the following events make it plain that Reading cannot now rely upon C&O-B&O for the financial benefits and support it will need to compete with other large systems:

1. The announcement of the N&W-C&O merger proposal on August 31, 1965 not only advanced, for the first time, the suggestion for realigning the Eastern railroads on the basis of two systems—N&W-C&O and Penn-Central—but also gave, for the first time, an indication of a possible change in the role of Reading in the C&O-B&O System. C&O-B&O there stated:

> "The C&O indirectly has a substantial investment in the stock of both Reading and Central of New Jersey. But it has no obligation to include these railroads in its present system, and *acting alone it could not work out any practicable plan of inclusion which would be equitable to C&O security holders.*" (Emphasis supplied)

2. One year later in their brief dated September 19, 1966 in F.D. No. 21510, the so-called "inclusion proceeding", C&O-B&O stated (p. 7):

> "While both Reading and CNJ are affiliated through stock ownership with C&O-B&O and are vitally

important as railroad connections of C&O-B&O, C&O-B&O alone cannot solve the financial problems of the two affiliates (Tr. 1396-7; 1525). *Consummation of the N&W-C&O merger and the Dereco Plan offers the only solution to Reading-CNJ problems that can now be foreseen."* (Emphasis supplied)

3. Finally, on March 6, 1967 a Verified Statement of Mr. Gregory S. DeVine, President of C&O-B&O, was filed in the *N&W-C&O Merger* case, F.D. No. 23832, which stated (p. 13):

"Reading and CNJ are in real need of help. A Penn-Central merger will seriously curtail, if not eliminate, the ability of C&O-B&O to provide any further assistance to Reading and CNJ. At the same time it will greatly increase their need for help.

"* * *

"Even if the Western Maryland aspect of this problem were solved and C&O-B&O were empowered to control it, *it would be impossible to predict when, if ever, C&O-B&O could assist Reading and CNJ.* As the Commission knows, C&O has made a very large investment in B&O and has very important commitments to it. While C&O's investment in B&O has been an outstanding success, the amount of the investment has been large even for a financially strong C&O, and still further funds will be required. It has been our position that we could not, all other considerations apart, undertake signfi-

cant commitments for Reading and CNJ until our process of revitalizing B&O had been completed. [*]

"Given the facts of a Penn-Central merger, its overwhelming competitive strength, and the financial injury it will cause other Eastern railroads, including C&O, B&O and the family lines I have been discussing, *it becomes exceedingly difficult for C&O-B&O to provide future help for Reading and CNJ.*

"* * *

"* * * Just as N&W feels that it cannot alone bear the burden of supporting Erie-Lackawanna, Delaware & Hudson and Boston & Maine, *so C&O-B&O feel that they cannot alone bear the burden of of supporting Reading and CNJ.* Responsibility for the preservation of these five railroads should not not be divided, thus placing an added drain on the separate resources of N&W and C&O-B&O. *The strength of a merged C&O-N&W, and the anticipated merger and Dereco savings are essential if there is to be any reasonable hope of preserving the services these railroads provide the public."* (Emphasis supplied)

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*Reporting the annual stockholders' meeting of the C&O on March 31, 1967, *The New York Times* of April 1, 1967 stated at pages 35 and 44:

"As to the C&O's own plans for eventually merging with the Baltimore & Ohio Railroad, of which it now owns more than 90 percent, Mr. DeVine was most negative. 'There are no present plans for the B&O and C&O to merge,' he said.

"At a news conference following the meeting, Mr. DeVine explained that while such a merger is an eventual 'goal', early consolidation of the two railroads was out of the question."

Any remaining doubt as to the inability or unwillingness of C&O-B&O to assist Reading and CNJ is dispelled by the fact that on March 22, 1967, CNJ found it necessary to initiate reorganization proceedings pursuant to Section 77 of the Bankruptcy Act (11 U.S.C. §205) in the United States District Court for the District of New Jersey (No. B401-67). An order approving CNJ's petition under §77 was issued by the Court the same day.

III. Unless Appropriate Conditions are Imposed in This Proceeding, Reading May Be Unable to Survive.

A. The Penn-Central Merger Will Have a Serious Adverse Effect on Reading.

PRR is now the chief competitor of Reading. On the other hand, NYC is an important connection of Reading, both directly at Newberry Junction (Williamsport), Pa. and indirectly through NYC's subsidiary, P&LE, which participates in joint routes with Reading and Western Maryland. The Penn-Central merger will combine these two large systems and create "the largest railroad merger in our history". *B&O R. Co., et al.* v. *United States,* 35 LW 4271, 4277. It is to be expected that the merged Penn-Central will, wherever possible, solicit its longest haul, and that traffic now interchanged with Reading by NYC will in large measure be diverted from Reading to the lines of the merged company. In approving the Penn-Central merger, *Pennsylvania R. Co.-Merger-New York Central R. Co.,* 327 I.C.C. 475, 491, the Commission found:

> "Shippers may expect numerous service advantages as a result of the merger. There will be single-line service between more points, with less

route-circuitry, less handling of freight, less switching of cars, and consequently less likelihood of damage, less time in transit and terminal, and easier tracing of shipments."

The Commission went on to point out other advantages which Penn-Central will have such as a modern large car supply with versatile and specialized equipment. The superior service which the merged company will thus be able to provide will induce shippers to use Penn-Central whenever a choice of competing lines is available. The vast coverage of that system, as compared with the limited territory served by Reading, will place Reading at an overwhelming competitive disadvantage.

In the instant proceeding, the Commission recognized that "the rapidly changing railroad unification picture in the East" is a factor which "has a direct bearing upon Western Maryland's future strength and viability", 328 I.C.C. at p. 695. If this finding is true with respect to Western Maryland, it is *a fortiori* applicable to Reading. Not only would Penn-Central reach just about all the communities of any size which Reading serves, but, as compared with Western Maryland, Reading alone would be less able financially to encounter Penn-Central's competition.

Reading's net income declined from a high of $12 million in 1956 to a deficit which was as great as $6.4 million in 1963. In each of the years 1961 through 1964, Reading incurred a deficit, the smallest being a deficit of $4.9 million in 1962. Although in 1965 Reading experienced a vast improvement when it earned $2.9 million, as compared with a 1964 deficit of $5.3 million, Reading's results for 1966 showed a net income of only $1.7 million. In light

of Reading's prior deficits and its modest net income of recent years, it is manifest that unless Reading is able to obtain all the advantages which flow from its being a protected component of a large system, it will be exceedingly difficult for Reading to continue providing efficient transportation service once the benefits of the Penn-Central merger are realized.

B. The Commission Should Consider the Effect Upon the Public Interest of Inclusion or Non-Inclusion of Reading in the Transaction.

At the conclusion of its discussion concerning Reading and CNJ, the Commission found that B&O acquired control of Reading "alone, or in concert with" NYC before the Commission acquired jurisdiction under the Transportation Act of 1920 (328 I.C.C. at p. 708). While this finding is correct, it creates no responsibility in C&O-B&O to assure that Reading's transportation service will be preserved, particularly in the face of the increased competition to be expected from the Penn-Central merger or the inclusion of E-L, D&H and B&M in the present N&W.

Section 5(2)(c) of the Interstate Commerce Act (49 U.S.C. §5(2)(c)) requires the Commission to weigh "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction * * *." The Commission's finding that B&O controls Reading, without attaching any economic responsibility, does not satisfy this statutory standard.

The statutory phase "inclusion in the proposed transaction" is imprecise; and the argument may be advanced that Reading is included in the transaction by virtue of C&O-B&O's existing ownership of a controlling amount

of Reading stock. It is obvious, however, that Congress, in requiring the Commission to weigh the effect upon the public interest of the inclusion or non-inclusion of other railroads in the transaction, was not concerned so much with mere stock ownership as with responsible economic relationships which will assure the continuity and adequacy of the transportation services provided by carriers who are not parties to the originally proposed transaction. The events which we have listed earlier herein demonstrate that the stock control relationship with C&O-B&O will not, at least without further Commission action, provide Reading with the support it will need to continue essential transportation services for the indefinite future, particularly in the face of the Penn-Central merger.

The present posture of the Eastern railroad unification movement urgently requires Commission action in this proceeding to protect the public's interest in Reading's essential services until such time as Reading can be merged into C&O-B&O or some other major Eastern system. It is now too late to "save" CNJ without reorganization, and only if appropriate measures are adopted here will the public dependent upon Reading be sure of having available the "safe, adequate, economic and efficient service" contemplated by the National Transportation Policy (49 U.S.C. preceding §1).

Reading is mindful of the fact that N&W-C&O have expressed their willingness to include Reading in their proposed system as a part of the Dereco Plan. While Reading advocates the N&W-C&O System as a necessary counterweight to Penn-Central, and as the *only* solution proffered so far to Reading's own efforts to survive and grow, Reading cannot risk withdrawal, disapproval or even the time

necessary for approval of the N&W-C&O proposal.* In view of the Commission's limited power to *initiate* measures to assist Reading, this proceeding provides the Commission with its only opportunity to deal affirmatively with Reading's status now. C&O-B&O has made it clear that it will not voluntarily undertake "significant commitments" to Reading and CNJ until the "process of revitalizing" B&O has been completed.** C&O-B&O also has made it plain that the process will be a lengthy one. The Commission should not neglect this present, and possibly last, opportunity to secure the economic future of Reading and thereby assure the adequacy of its essential service.

In remanding the Penn-Central merger case to the Commission, the Supreme Court clearly held that "the inclusion proceedings" (Reopened F.D. No. 21510) must be concluded prior to consummation of Penn-Central. *B&O, et al.* v. *United States, supra,* 35 LW at p. 4273. Issues concerning the adverse effects of inclusion on Reading and other parties remain unresolved by the Court. But if the inclusion proceedings should result in the inclusion of E-L, D&H and B&M in the present N&W System, and Penn-Central is thereupon consummated, Reading will be the only railroad whose survival is in doubt, and the ability

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*N&W-C&O's offer to include E-L, D&H, B&M, Reading and CNJ in their proposed system is subject to a number of conditions including the condition that there be (joint application of N&W-C&O, F. D. No. 23832, p. 31):

> "(3) No substantial adverse change in the financial position of either Erie-Lackawanna, Boston & Maine, Reading, Jersey Central or Delaware & Hudson."

The CNJ's bankruptcy obviously, therefore, raises serious questions concerning the status of N&W-C&O's proposal with respect to all five of the lines proposed to be included in the transaction.

**Statement of Gregory S. DeVine, February 3, 1967, Exhibit No. A-3, as circularized March 6, 1967 in F. D. No. 23832, et al.

of CNJ to emerge from reorganization will be more questionable than ever.

Under all these circumstances the Commission should not permit the consummation of any further merger or control transaction until the preservation of the transportation service of Reading is assured by making it a protected component of a large system. To this end, it is Reading's intention to file with the Commission a petition for consolidation of all related Eastern railroad merger and control cases.

The public interest in a sound system of rail transportation necessitates an evaluation of a proposed rail consolidation with reference to its effect on railroads who are not parties to the transaction and to their future place in the national transportation scheme. As Justice Brennan said in his concurring opinion in *B&O, et al.* v. *United States, supra,* 35 LW at 4280:

> "[Section 5(2) of the Interstate Commerce Act and the National Transportation Policy] call for the application of discerning judgment to a wide range of factors, and preclude the position that the purpose of the 1940 Act is simply to promote railroad consolidation. [Footnote omitted] The ICC has recognized that inquiry into a proposed transaction does not end with the possibilities for increased economies, but extends to 'the effect of the transaction upon adequate transportation service to all parts of the public which would be so affected,' [cases cited in note omitted] which encompasses *the 'duty, as an administrative matter, to consider the effect of the merger* on competitors and *on the general competitive situation in the industry* in the light of the objectives of the National Transporta-

> tion Policy.' *McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 87. 'The public interest is the prime consideration and in making that determination *we must have regard for all relevant factors.' Toledo P. & W. R. Co.-Control,* 295 I.C.C. 523, 547." (Emphasis supplied)

The test is the same whether the transaction involves merger or, as in this case, control. This standard, when applied in the light of the present C&O-B&O attitude toward Reading, means that the Commission should decide whether conditions should be imposed to preserve the transportation service provided by Reading. In other words, the fact that the transportation service of Reading is jeopardized by the Penn-Central merger and other consolidations and the fact that this proceeding may offer the Commission its only effective opportunity to preserve transportation service for the public served by Reading, obligates the Commission now to decide whether further conditions should be imposed before permitting consummation of this transaction.

More specifically, the statutory requirement that the Commission give weight to the effect upon the public interest of the inclusion or non-inclusion of other railroads in the transaction now requires more of the Commission than what it has done on the present record. The effect of the Commission's finding of C&O-B&O stock control over Reading is inconclusive. When formal corporate alignments insufficiently assure attainment of the legislative objective, the Commission is not without means to fashion an appropriate remedy.

This case is necessarily related to other cases involving Eastern Railroads arising under Section 5(2) of the Act

and consideration of the effects of Reading's inclusion affects the time of consummation of this transaction. The Commission's power to impose conditions is broad and has been extensively employed in this and similar transactions. All indications now are that irrespective of whether Reading may be "included" in the C&O-B&O System, Reading's stock relationship to C&O-B&O will not assure its survival. In *Penn-Central,* the Commission recognized that a control relationship does not guarantee the survival of the subsidiary when it required Penn-Central to maintain its stock and other holdings in The Lehigh Valley Railroad Company and to "render such support, financial and otherwise, as the Commission from time to time, may determine necessary to keep such railroad operational." *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 327 I. C. C. 475, 555 (1966). We believe that the Commission ought to weigh now the possibility that Reading may not be able to survive without the aid of similar assurances.

Many of the facts and conclusions related herein, which make it clear that Reading does not have the support and future expectations which dictated its originally limited role in this proceeding, are not of record. They have occurred since the hearings closed, and indeed many have occurred only in the last few weeks. It is essential that a new hearing be held to make these facts and their consequences a matter of record so that the Commission may provide Reading with the present and future protection it needs.

V. Conclusion

Reading respectfully requests the Commission, after further hearing:

1. To find that the service provided by Reading is essential to the public;
2. To find that Reading cannot provide its essential services without aid from a major system, particularly if the Penn-Central merger is consummated;
3. To order that, as a condition to consummation of the transaction, applicants be required to render such support, financial and otherwise, as may be required from time to time to keep the Reading economically viable until Reading has been merged into C&O-B&O or one of the other major Eastern systems, or until further order of the Commission.

Pending the determination of such issues, we request that consummation of the transaction be deferred.

Respectfully submitted,

READING COMPANY

By .....

H. Merle Mulloy
William P. Quinn

Philadelphia, Pa.
April 5, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Southern District of New York

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JURISDICTIONAL STATEMENT

City of Scranton (Scranton) and Milton J. Shapp (Shapp) appeal from the Order of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing their respective intervening complaints in the Penn-Central merger case with prejudice pursuant to 41 (b) F.R. Civ. P., and submit this Statement to show that the Supreme

Court of the United States has jurisdiction of the appeal and that substantial questions are presented. Scranton and Shapp were not parties to the district court proceedings involving the so-called N&W Inclusion case.

OPINIONS BELOW

The three-judge district court for the Southern District of New York issued four opinions, one dated July 3, 1967, two dated July 26, 1967, and one dated October 19, 1967, none of which are yet reported.

The opinion of July 3, 1967 is set forth as Appendix A to the jurisdictional statement in No. 778, *Baltimore and Ohio Railroad Company, et al.* v. *United States.*

The two opinions of July 26, 1967 are set forth herein as Appendix A.

The opinion of October 19, 1967 is set forth as Appendix B to the jurisdictional statement in No. 778, *Baltimore and Ohio Railroad Company, et al.* v. *United States.*

The report and order of the Interstate Commerce Commission in *Pennsylvania R. Co.-Merger-New York Central R. Co.,* dated June 9, 1967, is reported at 330 I.C.C. 328.

JURISDICTION

Scranton and Shapp were intervening plaintiffs to an action by Erie-Lackawanna Railroad Company brought in September 1966 under Title 5, U.S.C. Section 704 and Title 28, U.S.C. Sections 1336, 2284 and 2321-25 to enjoin, annul and set aside orders of the Interstate Commerce Commission (I.C.C.) dated April 6 and September 16, 1966, which approved and authorized the merger of The Pennsylvania Railroad

Company (PRR) and The New York Central Railroad Company (NYC).[1] The order of the district court dismissing the intervening complaints of Scranton and Shapp was entered on October 19, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

The district court dismissed with prejudice the intervening complaints of Scranton (filed September 27, 1966) and Shapp (filed September 13, 1966 and supplemented September 22, 1966) upon motion of the United States and Interstate Commerce Commission, joined by PRR and NYC, for failure of Scranton and Shapp to supplement their earlier complaints so as to attack the June 9, 1967 order of the I.C.C. in the Penn-Central case.[2] The order of dismissal was based upon 41 (b) F.R. Civ. P. While the district court entertained no doubt of the sufficiency of the dismissal on that ground, it thought it well to add that it finds no merit in the complaints on the ground that appellants' attacks simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission. (No. 778, J.S. App. B8-B9)

The following questions are presented:

1. Is not an attack by intervenors in a three-judge court against a specific order of the Interstate Commerce Commission rendered moot by a

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[1] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 and 328 I.C.C. 304 (1966).

[2] 330 I.C.C. 328 (1967).

later order entered by the Commission as a result of a remand directed by the Supreme Court?

2. Should a statutory court dismiss with prejudice the claims of intervenors who had appeared with respect to a prior order of the Interstate Commerce Commission, but who chose not to litigate in that court but rather to litigate in another court where they could attack not only the subsequent order but also another order, both of which were admittedly inextricably interwoven?

3. Where there is a dismissal on the merits, based on a refusal to litigate in that court, particularly when the case involves one of the most important mergers in the history of the United States, is it not mandatory that there be findings of fact and conclusions of law as to all the significant issues of grave public concern?

STATUTES INVOLVED

The statutes involved in this case are Judicial Code, 28 U.S.C. Sections 1253, 1336, 2101 (b), 2284, 2321-25; Interstate Commerce Act, 49 U.S.C. Section 5(2). The text of these statutes is set forth in Appendix C to the jurisdictional statement in No. 778, *Baltimore and Ohio Railroad Company, et al.* v. *United States.*

Rule 41 (b) of the Federal Rules of Civil Procedure is set forth herein as Appendix B.

STATEMENT

Scranton and Shapp in September 1966 intervened in the action brought by Erie-Lackawanna Railroad Company to set aside and enjoin the orders of the Interstate Commerce Commission dated April 6 and September 16, 1966 which at that time approved and au-

thorized merger of The Pennsylvania Railroad Company and The New York Central Railroad Company.[3] Intervenors supported the motions of various railroad plaintiffs seeking a temporary injunction of the merger orders.

The district court, on October 4, 1966, denied a temporary injunction of the I.C.C. orders in *Erie-Lackawanna R. Co.* v. *United States,* 259 F. Supp. 964 (S.D. N.Y. 1966). Consummation of the Penn-Central merger was stayed by the Supreme Court, 385 U.S. 914. On March 27, 1967 the Supreme Court reversed the judgment of the district court and remanded the cause with instructions that it be remanded to the I.C.C. for further proceedings. *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 392 (1967).

The subsequent order of the district court on mandate of the Supreme Court was entered April 28, 1967. It read:

"IT IS ORDERED that:

1. The order of this court entered on October 4, 1966, denying a temporary injunction is vacated;

2. The cause is remanded to the Interstate Commerce Commission for further proceedings not inconsistent with the Supreme Court's opinion of March 27, 1967;

3. The orders of the Interstate Commerce Commission entered on April 6 and September 19, 1966, in Finance Docket No. 21989 and 21990, insofar as they authorize the immediate consummation of the proposed merger between the Pennsylvania Railroad Company and the New York Central Rail-

[3] 327 I.C.C. 475 and 328 I.C.C. 304 (1966).

road Company, are enjoined pending the completion of the proceedings directed by the Supreme Court."

The various parties to the Supreme Court proceedings thereupon made their respective positions known to the I.C.C. as to the type of further proceedings that should be undertaken by the agency. The Commission denied petitions to consolidate *Penn-Central* with the N&W Inclusion [4] proceeding, and denied petitions by Scranton and Shapp which sought further hearings. Instead, on June 12, 1967, the agency released simultaneously separate reports in Penn-Central and N&W Inclusion, each dated June 9, 1967.

Events Subsequent to June 12, 1967

N&W brought an action to set aside the I.C.C.'s *N&W Inclusion* order on June 13, 1967 in the Western District of Virginia. On June 16, 1967 the railroad parties to the former district court proceeding met with the I.C.C. and U.S., and discussed the future course of Penn-Central with the three judges in chambers. Scranton and Shapp were not invited to this conference. Two show cause orders for motions were subsequently issued: (1) At the request of PRR and NYC that parties supplement their complaints in Penn-Central to embrace the June 9, 1967 I.C.C. order or be dismissed with prejudice; (2) At the request of N&W and its allies that the April 28, 1967 order on mandate of the Supreme Court be amended so as to enjoin the June 9, 1967 order in Penn-Central.

Also, on June 16, 1967, the Erie-Lackawanna Railroad Company brought a single action in the district

[4] *Norfolk & W. Ry. Co. and New York, Chicago & St. Louis*, 330 I.C.C. 780 (1967).

court which sought (1) to enforce the I.C.C. order in N&W Inclusion, and (2) to enjoin consummation of Penn-Central pending determination of the enforcement of N&W Inclusion.[5] E-L subsequently moved to consolidate its action with the prior Penn-Central actions.

The district court set hearing for June 28, 1967 on the motions made pursuant to the show cause orders and E-L's motion for consolidation. Returns to the show cause motions were made June 27, 1967. Other developments prior to the June 28, 1967 hearing were: (1) D&H instituted an action June 23, 1967 limited to certain features of N&W Inclusion,[6] and (2) Borough of Moosic instituted a consolidated action June 26, 1967 in the Middle District of Pennsylvania against the Penn-Central and N&W Inclusion orders of June 9, 1967.[7]

Opinion of July 3, 1967

N&W and its allies threatened to institute actions against the Penn-Central order of June 9, 1967 in numerous district courts. The June 28, 1967 hearing in the district court revealed a general consensus among the railroad parties that Penn-Central would be heard in New York and that N&W Inclusion would be heard in Virginia. PRR, NYC and N&W all opposed E-L's attempt to consolidate Penn-Central with its *N&W*

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[5] *Erie-Lackawanna Railroad Company* v. *United States* and *Norfolk & Western Ry. Co.* (67 Civ. 2362, S.D.N.Y.).

[6] *Delaware & Hudson R. Corp.* v. *United States* (67 Civ. 2451, S.D.N.Y.); Boston & Maine intervened as a plaintiff.

[7] *Borough of Moosic* v. *United States* (No. 10054-Civil, M.D. Pa.); Scranton and Shapp intervened as plaintiffs. Intervention was denied City of Pottsville. See: No. 4433, *City of Pottsville* v. *U.S.*

Inclusion enforcement action, and the E-L action itself was subsequently discontinued.

The district court on July 3, 1967 issued its memorandum order granting the PRR-NYC motion to require all parties to supplement their September, 1966 complaints or be dismissed with prejudice. The court also temporarily enjoined the June 9, 1967 I.C.C. order in Penn-Central. A briefing and hearing schedule was ordered. The court contemplated in its opinion that N&W Inclusion would not be heard in the Southern District of New York.

Opinions of July 26, 1967

Scranton and Shapp on July 17, 1967 moved the district court that they be permitted to withdraw from the Penn-Central proceeding or that the action be stayed pending resolution of the *Moosic* case in the Middle District of Pennsylvania.

The I.C.C. and U.S. on July 20, 1967 moved the district court to (1) enjoin Scranton, Shapp and N&W from participating, respectively, in the Middle District of Pennsylvania and Virginia proceedings; and (2) join N&W as an involuntary plaintiff to D&H's action in N&W Inclusion and to establish a briefing and hearing schedule in that cause.

Prior to July 20, 1967 the Middle District of Pennsylvania had stayed the *Moosic* case, which attacks Penn-Central and N&W Inclusion, until October 1, 1967 or until further order of the court; the Virginia court had established a briefing and hearing schedule for N&W Inclusion.

The district court denied the motion to enjoin Scranton, Shapp and N&W from participating in other pro-

ceedings. The court denied permission for Scranton and Shapp to withdraw from the Penn-Central case or to stay its Penn-Central proceeding. The court granted the motion to join N&W as an involuntary plaintiff to D&H's N&W Inclusion action. The court set a briefing, hearing, and argument schedule for N&W Inclusion separate and apart from Penn-Central. The court, *sua sponte,* gave Scranton and Shapp until August 2, 1967 to amend their complaints in Penn-Central, and extended an invitation to Moosic and Pottsville to intervene.

Scranton and Shapp on August 2, 1967 filed their statement of objections to the court's order. Their basic objections, which they had previously expressed, were that Penn-Central and N&W Inclusion were being split into separate proceedings and that the district court did not have jurisdiction over them with respect to the June 9, 1967 order in Penn-Central. The pleading and briefing schedule in N&W Inclusion did not commence until August 14, 1967 because the Commission's report and order on reconsideration in N&W Inclusion was not issued until that date.

Opinion of October 19, 1967

The district court heard Penn-Central on September 18, 1967. Hearing on N&W Inclusion was held September 28, 1967, with reply briefs submitted October 5, 1967. The district court rendered its opinion in both proceedings on October 19, 1967. The court granted the motion of the I.C.C. and U.S., joined in by PRR and NYC, that Scranton and Shapp be dismissed with prejudice in Penn-Central, pursuant to 41(b) F.R. Civ. P., for failure to file supplemental complaints attacking the June 9, 1967 order of the I.C.C. in Penn-

Central. The court added that it found no merit to the complaints of Scranton and Shapp,[8] stating that their attacks simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission. (No. 778, J.S. App. B8-B9)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The June 9, 1967 Order of the I.C.C. After Remand From the Supreme Court Mooted the Earlier Intervention of Appellants in the District Court's Penn-Central Case.

The order of the district court on mandate of the Supreme Court in *B. & O. R. Co.* v. *United States, supra,* was entered April 28, 1967. That order remanded the Penn-Central cause to the I.C.C. for further proceedings not inconsistent with the Supreme Court opinion. All that remained in the district court was an injunction preventing consummation of the merger pending completion of the I.C.C. proceedings directed by the Supreme Court. This injunction disappeared immediately upon issuance of the June 9, 1967 order of the I.C.C., which order established July 17, 1967 as the new effective date after which the merger could be consummated.

The only basis for any continuing jurisdiction by the district court would have been if the I.C.C.'s order of June 9, 1967 in Penn-Central were found to be inconsistent with the mandate of the Supreme Court or the district court. The district court on July 3, 1967 did not find any inconsistency. Rather, the district court concluded only to amend its mandate order and thus enjoin the merger pending hearing and determination

[8] The U.S. and I.C.C. did not answer the complaints of Scranton and Shapp.

of the objections to the supplemental report in Penn-Central.[9] (No. 778, J.S. App. A-15) The thrust of the district court's amendment of its order on mandate of the Supreme Court was therefore unrelated to any I.C.C. violation of the Supreme Court or district court mandates, but was simply comparable to the issuance of an ordinary temporary injunction pending judicial review of a new law suit.

It follows that the district court was without jurisdiction to require Scranton and Shapp to file amended complaints in Penn-Central since the cause had been remanded on April 28, 1967 to the I.C.C. The I.C.C. orders of April 6 and September 16, 1966 were mooted by the June 9, 1967 order after remand. This is recognized by the district court in its judgment of October 19, 1967, where the June 9, 1967 order is the only effective I.C.C. order deemed to authorize consummation of the merger. (No. 778, J.S. App. B-71)

In a situation involving remand of an action by the Supreme Court to an agency through an initial reviewing court, the Court of Appeals for the District of Columbia held that a subsequent order of the agency gave rise to a new action. *Sierra Pac. Power Co.* v. *F.P.C.*, 223 F. 2d 605, 609 (D.C. Cir. 1955), aff'd *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956). *Pacific Gas & Elec. Co.* v. *F.P.C.*, 272 F. 2d 510 (D.C. Cir. 1958).

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[9] The parties seeking amendment of the April 28, 1967 order urged that consummation of Penn-Central must be enjoined pending judicial review of N&W Inclusion to comply with the Supreme Court mandate.

II. The District Court Should Have Granted Appellants Leave To Withdraw From the Penn-Central Action.

The various procedural developments in the district court boil down to a basic conflict between the railroad parties and Scranton and Shapp. The Commission had refused to consolidate Penn-Central with N&W Inclusion, even after remand in *B. & O. R. Co.* v. *United States.* The railroad parties preferred the case-by-case resolution of the eastern railroad unification applications. N&W, which became a party to the Commission's Penn-Central proceeding only in September 1966,[10] insisted upon a separate judicial review for N&W Inclusion, and promptly filed suit on June 13, 1967 in the Western District of Virginia to insure such separate consideration.

N&W was not alone in desiring separate court proceedings for Penn-Central and for N&W Inclusion. Its position was actively supported by PRR and NYC before the district court.[11] The July 3, 1967 opinion of the district court contemplated that it would only hear Penn-Central; N&W Inclusion would be heard elsewhere. (No. 778, J.S. App. A-17)

An inherent conflict, giving rise to this appeal, arose when the U.S. and I.C.C. sought to join N&W as an involuntary plaintiff to D&H's N&W Inclusion action in the district court, and to establish a separate pleading, briefing and argument schedule. Scranton and Shapp had moved that they be granted leave to withdraw from the Penn-Central proceeding. All of these motions were heard July 25, 1967. The N&W desire for separate review of N&W Inclusion ran counter to

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[10] The Commission granted N&W very limited intervention in Penn-Central, 328 I.C.C. 304, 306, 328-29.

[11] Only E-L initially desired consolidation in the district court.

Scranton and Shapp's desire that Penn-Central and N&W Inclusion be heard together. A major impediment to consolidated pleading and briefing was that the Commission's report on reconsideration in N&W Inclusion was not released until August 14, 1967. The district court's procedure for N&W Inclusion (identical with the Virginia Court) provided for the filing of supplemental complaints 7 days thereafter, and initial briefs 18 days thereafter. This conflicted with the August 8, 1967 date for initial briefs in Penn-Central. Moreover, there were parties to D&H's N&W Inclusion case that were not parties to the Penn-Central action.

The U.S. and I.C.C. did not seek to join Scranton and Shapp as involuntary plaintiffs to the district court's N&W Inclusion case, yet opposed their withdrawal from the Penn-Central action. The district court's memorandum orders of July 26, 1967 (Appendix A herein) clearly indicated that the court considered Penn-Central and N&W Inclusion to be separate cases.

The question of dismissal with prejudice pursuant to 41(b) F.R. Civ. P. is one for the discretion of a court, and depends on the facts of a particular situation. 5 Moore Fed. Practice at p. 1115-40. Appellants submit that the district court abused its discretion in failing to dismiss Scranton and Shapp *without* prejudice under the circumstances. The I.C.C. had declined to consolidate the two matters, but this does not preclude consolidated pleadings, briefs and argument by a reviewing court. The difficulty in the district court was that N&W, having been given only limited intervention in the Commission's Penn-Central proceeding and insisting upon separate judicial review of Penn-Central and N&W Inclusion, strongly opposed

consolidation. Its position was supported by the other railroads, tacitly or openly, with the exception of E-L. This situation called for the withdrawal of Scranton and Shapp from the district court's Penn-Central proceeding so that they could attack Penn-Central and N&W Inclusion on a consolidated basis in the Middle District of Pennsylvania. City of Scranton is served by E-L, D&H and CNJ. It is not served by PRR or NYC. Accordingly, it cannot realistically attack Penn-Central and N&W Inclusion in separate proceedings.

Support for appellants' contention that Penn-Central and N&W Inclusion are sufficiently related to warrant consolidated judicial review does not merely stem from this Court's opinion in *B. & O. R. Co.* v. *United States*, but is also apparent from the very language employed by the I.C.C. and U.S. in seeking to have the district court enjoin Scranton and Shapp from participation in the Middle District of Pennsylvania. The memorandum in support of an injunction against them termed Penn-Central and N&W Inclusion to have been "wholly intertwined" since June, 1964; further, that the two proceedings were "wholly interrelated" and "completely intertwined." The memorandum submitted by the United States to the Supreme Court in *B. & O. R. Co.* v. *United States* urged consolidated judicial review as a substitute for remand of Penn-Central to the I.C.C. for consolidation. (*Memo*, pp. 30-32) Now, in this Court, No. 778 (Penn-Central) and No. 779 (N&W Inclusion) have been consolidated for all purposes. Such consolidation should have been made in the I.C.C. proceedings.

The district court erred in dismissing Scranton and Shapp with prejudice. Their motion for leave to withdraw should have been granted.

III. The Substantial Issues Raised By Appellants Are Not Matters Committed Exclusively To Agency Discretion

The district court held that the September 1966 complaints of Scranton and Shapp simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission. (No. 778, J.S. App. B-9)

The initial complaint of Shapp was filed September 13, 1966, and supplemented on September 22, 1966. Scranton's complaint was filed September 27, 1966. The Scranton complaint was similar to the initial Shapp complaint. The Shapp supplemental complaint attached Shapp's July 11, 1966 petition for reconsideration to the I.C.C. as additional grounds for setting aside the I.C.C. orders of April 6 and September 16, 1966. This petition is reproduced as Section E to the Joint Appendix in Nos. 813 and 814, October Term 1966, *B. & O. R. Co.* v. *United States.* The complaint of Scranton, filed September 27, 1966, is included herein as Appendix C.

The district court erred in holding that the matters raised by appellants are committed exclusively to the Commission. Orders of the I.C.C. approving railroad mergers are subject to the full range of judicial review provided by the Administrative Procedure Act. Section 10(e) of the APA provides that agency action, findings and conclusions shall be set aside where unsupported by substantial evidence. In Penn-Central, the Commission concluded that it was dealing with a "failing industry"; that eastern district railroads, and PRR and NYC specifically, will face a continued decline in output; that the record shows no reason for optimism on applicants' traffic level; that the prospects clearly import that the merger will benefit rather than harm Pennsylvania.

The above matters, which are only illustrative of the findings and conclusions challenged by appellants, are

not immune from judicial review. Substantial evidence will not support the finding that the merger involves a "failing industry" or that traffic volume on PRR and NYC is in a secular decline. The basis for the bulk of the Commission's conclusions in approving the merger are simply irrational, and not based upon economic facts. The Congressional objectives claimed to be followed by the I.C.C. are in sharp conflict with the stated desires of Congress. Similarly, with respect to the state of Pennsylvania, appellants assert that the evidence shows a harmful impact upon its citizens.

The complaints of Scranton and Shapp also raised many issues of law. Among these were whether Transportation Act of 1940 and its national transportation policy changed the "public interest" criteria of the 1920 legislation relied upon in Penn-Central;[12] whether the I.C.C. properly declined to consider market competition between PRR and NYC in evaluating the anti-competitive consequences of the proposed transaction; whether the non-railroad activities of PRR and NYC should have been considered, both with respect to competition and as to financial viability; whether findings are required concerning interlocking directorates, combined purchasing power and reciprocity between shippers and carriers; whether further hearings and eventual consolidation with N&W Inclusion and/or the proposed N&W-C&O merger should have been ordered; and whether the recent passenger train discontinuance law, enacted as part of Transportation Act of 1958, must be considered as bearing upon Section 5(2)(c) with respect to inclusion of the New Haven railroad in the transaction.

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[12] *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25 (1932); *Texas* v. *United States*, 292 U.S. 522, 531 (1934); *United States* v. *Lowden*, 308 U.S. 225, 230 (1939). See also dissent of Douglas, J. with respect to 49 U.S.C. Section 5(2)(c) in *B. & O. R. Co.* v. *United States*.

The district court erred in holding that these issues, involving matters of law, are within the discretion of the Commission and thus immune from judicial review. The importance of the Penn-Central merger, which would constitute the largest corporate merger in our history, warrants a searching judicial review, in the national interest, prior to consummation. Since these appellants were the only parties in the district court challenging the Commission's basic finding in Penn-Central, they should have not been summarily dismissed without an adversary proceeding. The Penn-Central merger requires judicial review even if it means the appointment of special counsel to present these public interest questions.[13]

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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November 17, 1967

[13] Subsequent to the filing of appellants' application for Stay in this Court, the Middle District of Pennsylvania, upon renewed joint request of the I.C.C. and U.S., has set a schedule leading to final hearing on the merits of the complaints in the *Moosic* case, with oral argument on December 15, 1967. The *Moosic* case attacks the basic public interest and competition findings in both Penn-Central and N&W Inclusion, on a separate as well as on a consolidated basis.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

THE DELAWARE & HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON and BOROUGH OF FREEDOM, and BOSTON & MAINE R.R. Co., Intervening Plaintiffs,

PENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor, Intervening Defendants.

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant,
WESTERN MARYLAND RAILWAY COMPANY,
Intervening Plaintiff.

Memorandum on Motions of Trustees of Central Railroad of New Jersey, Boston & Maine Corporation, and City of Scranton and Milton J. Shapp.

I. The Trustees of the Central Railroad of New Jersey (CNJ) having represented in their motion "that they will not assert in any Court any claim that the Penn-Central merger should be delayed for any reason" and having stipulated in open court that, while reserving the right to assert that the order of the Interstate Commerce Commission should contain protective conditions for the benefit of CNJ they will not ask that the Appendix G conditions in favor of other carriers be set aside, their motions to be relieved from the requirements of our Memorandum Order of July 3, 1967, insofar as that order requires them to file any amended complaint on or before July 17, 1967, to file a brief by August 8, 1967, to file reply briefs by September 12, 1967, and to bring the action as to them to final hearing on September 18, 1967, is granted.

II. Boston and Maine Corporation having represented to this Court that its "primary interest is that the Penn-Central merger actually occur and not be so long delayed that it fails of consummation," its motion to withdraw its complaint as an intervening plaintiff and to be realigned as an intervening defendant is granted.

III. The motion of the City of Scranton and Milton J. Shapp, intervening plaintiffs, for a stay of further proceedings or in the alternative to permit dismissal of their complaint without prejudice is denied, for reasons indicated in our Memorandum Order of July 3, 1967. The movants have shown no sufficient cause why, having invoked the jurisdiction of this Court where this litigation has been centered, they should now be allowed to present the self-same issues to another district court which has thus far had no occasion to occupy itself with their problems. Taking note of the Memorandum sur Motions of Defendant and Intervening Defendants for a Stay issued by the District Court for

the Middle District of Pennsylvania in Borough of Moosic et al. v. United States of America et al., Civ. No. 10054, on July 13, 1967, this Court will grant the Borough of Moosic and the City of Pottsville leave to intervene in these actions as plaintiffs if application accompanied by a complaint is made on or before August 2, 1967. The time of the City of Scranton and Shapp to file a supplemental complaint is similarly extended. In the event of such intervention or the filing of such a supplemental complaint pleadings responsive thereto shall be filed on or before August 12, 1967. The schedules set forth in our Memorandum Order of July 3, 1967, shall be complied with in all other respects. The hearing scheduled for September 18, 1967, will begin at 9:30 A.M. at a courtroom to be assigned.

In accordance with the suggestion made by counsel for the Interstate Commerce Commission, we place the various plaintiffs and intervening plaintiffs on notice that they are responsible for seeing to it that the court is furnished with the portions of the record they deem relevant to the issues they desire to raise. We shall expect the Commission to cooperate fully in this regard.

HENRY J. FRIENDLY
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

RICHARD H. LEVET
U.S.D.J.

26 July, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants.*

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant.*

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
and READING COMPANY, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant.*

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66 Civ. 2451

THE DELAWARE AND HUDSON RAILROAD
CORPORATION, *Plaintiff.*

v.

UNITED STATES OF AMERICA, *Defendant.*

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*

Memorandum on Motion for Injunction.

The United States of America and the Interstate Commerce Commission have moved this Court to enjoin

(1) the Norfolk and Western Railway Company from taking and further action in Civil Action No. 67-C-51-R, *Norfolk and Western Ry.* v. *United States,* before the United States District Court for the Western District of Virginia; and

(2) the City of Scranton and Milton J. Shapp from taking any further action in Civil Action No. 10054, *Borough of Moosic et al. v. United States,* before the United States District Court for the Middle District of Pennsylvania,

pending final determination of the instant actions by this Court.

For reasons indicated in our Memorandum Order of July 3, 1967, and in our order of today's date denying the motion of the City of Scranton and Shapp for a stay of 66 Civ. 2860 or for leave to dismiss their intervening complaint in that action without prejudice and on the basis of the authorities cited in the Memorandum in Support of the Motion, we entertain no doubt of the power and propriety of granting the relief sought by the United States and the Commission against them insofar as this relates to issues that can be litigated in the action in this court in which they have intervened, and we would do this if there were any evidence of need. However, the District Court for the Middle District of Pennsylvania has stayed proceedings in that court in Civ. No. 10054 until October 1, 1967, or further order of the court, and before that time we shall either have heard these parties in 66 Civ. 2860 or, if they should choose not to prosecute their intervening complaint, will have dismissed it with prejudice.

The portion of the motion asking us to enjoin the City of Scranton and Shapp from prosecuting so much of Civ.

No. 10054 in the Middle District of Pennsylvania as relates to the inclusion order, and the N&W from prosecuting Civ. No. 67-C-51-R in the Western District of Virginia raises a closer question. While we have no desire to assume additional burden, we must agree with the United States and the Commission, as the District Court for the Western District of Virginia also appears to do, that the "inclusion" case is sufficiently interrelated with the "merger" case that the public interest would be best served by their being handled by a single court of first instance, which is able to entertain both.[1] We agree also that the few days priority in time of the N&W's action in the Western District of Virginia with respect to the inclusion order over the D&H's action in this court in which the B&M has intervened, although relevant, is not conclusive in determining what

---

[1] This is sufficiently evidenced by the N&W's motion that we enjoin the merger pending final determination of both the merger action and the inclusion action. In our Memorandum Order of July 3, 1967, we indicated that if we found the merger order valid our determination whether or not to enjoin the merger pending final determination of the inclusion proceeding might well depend on the nature and substantiality of the objections to the inclusion order—a problem in which the aggravated plight of the New Haven, see Judge Anderson's memorandum of July 11, 1967, may be of great importance. If we are seized of the inclusion action, we shall not have the embarrassment of being obliged to predict the views of another court. Also, as made clear by the Erie-Lackawanna's petition for reconsideration to the Commission in the merger case, the lack of a capital indemnity provision, a point that may well come before us in the merger case, is important only if N&W's objections to the inclusion order are sustained. Again an important basis for the Commission's rejection of N&W's principal objection to the inclusion order, namely, that this should be deferred pending consideration of its merger with C&O-B&O, was that such a postponement would further delay the Penn-Central merger, this ground would appear more weighty to a court which had satisfied itself of the validity of that merger than to one unfamiliar with it. We cite these simply as examples, not as an all inclusive list.

district court should review an order of the Interstate Commerce Commission. Compare Eastern Air Lines, Inc. v. C.A.B. 354 F. 2d 507, 511 (D.C.Cir.1965). While the N&W's winning the race would normally be a sufficient reason for deferring to the District Court for the Western District of Virginia, with the D&H and the B&M having the right to intervene there, if the inclusion order stood alone, this may not be so when review of the inclusion order in this court, equally feasible in light of our grant of the motion of the United States and the Interstate Commerce Commission to join the N&W, would have the advantage of bringing the merger order and the closely related inclusion order before the same court. With only questions of law at issue and with an appeal as of right to the Supreme Court the considerations that usually favor allowing the plaintiff that has won the race to the courthouse to retain his victory lose much of their force. Indeed, the Amended Pre-Trial Order of the District Court for the Western District of Virginia made clear that the continuance of the N&W's action "shall not be construed to preclude any party from applying to the District Court for the Southern District of New York for an injunction restraining the other parties from the further prosecution of this action."

However, here again we see no sufficient reason for now deciding whether we could or should grant the injunction that is sought. The District Court for the Middle District of Pennsylvania has stayed the action there as we have indicated, the two judges of the District Court for the Western District of Virginia who were present at the hearing on July 11 and signed the Amended Pre-Trial Order of July 14, 1967 were of the view that the issues in Civil Action No. 67-C-51-R should be litigated in this court, and our order of even date has provided for a hearing at what appears to be the earliest practicable time.

We shall therefore leave the motion for an injunction undecided, with leave to the United States or the Interstate

Commerce Commission to bring it on for further hearing on five days notice if occasion therefore should arise.

HENRY J. FRIENDLY
U.S.C.J.

RICHARD H. LEVET
U.S.D.J.

EDWARD WEINFELD
U.S.D.J.

26 July, 1967

APPENDIX B

Federal Rules of Civil Procedure

Rule 41. Dismissal of Actions.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 66-2860

ERIE-LACKAWANNA RAILROAD COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*.

Complaint of Intervening Plaintiffs Pennsylvania Communities

I.

Intervenors, Borough of Freedom and City of Scranton, hereinafter termed "Pennsylvania Communities", are located in the Commonwealth of Pennsylvania.

Intervenors were participants in the proceedings before the Interstate Commerce Commission known as Finance Docket Nos. 21989 and 21990, *Pennsylvania R. Co-Merger-New York Central R. Co.*, decided April 6, 1966, as modified by report and order upon reconsideration served September 19, 1966.

II.

This action is brought under, and the United States is made a defendant under, and the jurisdiction of this Court is conferred by, United States Code, Title 28, Sections 1336, 1398, 2321-2325, inclusive; Interstate Commerce Act (49 U.S.C. Section 1, et seq. and particularly Section 17(9); the Fifth Amendment of the Constitution of the United States; and Section 10 of the Administrative Procedure Act (5 U.S.C. Section 1009).

III.

The venue of this action is in this Court, pursuant to the provisions of United States Code, Title 28, Section 1398,

referred to above, because plaintiff Erie-Lackwanna Railroad Company is a corporation maintaining its principal office at 250 Park Avenue, New York, N. Y., located within the jurisdiction of this Court.

IV.

The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce, approved February 4, 1887, 24 Stat. 283, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting transportation in interstate and foreign commerce.

V.

The proceedings before the Interstate Commerce Commission, in which the report and order herein complained of were made, and which orders are hereby sought by intervening Pennsylvania communities to be enjoined, set aside, suspended and annulled, embrace the merger of the New York Central Railroad Company into the Pennsylvania Railroad Company, reported in Finance Docket Nos. 21989 and 21990, *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I.C.C. 475, decided April 6, 1966 and served April 27, 1966, together with the report and order of the Commission upon reconsideration decided September 16, 1966 and served September 19, 1966.

The report and order of the Interstate Commerce Commission, annexed to the complaint of plaintiff Erie-Lackawanna Railroad Company as Exhibit A, as modified as to the effective date by subsequent orders of the Commission, copies of which are attached to the complaint of the Erie-Lackawanna Railroad Company as Exhibits B, C, and D, are adopted herein by reference pursuant to Rule 10(c) of the Federal Rules of Procedure.

VI.

The report and order of the Interstate Commerce Commission upon reconsideration decided September 16, 1966

and served September 19, 1966, attached as Exhibits 1 and 2 of the supplemental complaint of the Baltimore and Ohio Railroad Company, et al., dated September 20, 1966, and are incorporated herein by reference pursuant to Rule 10(c) of the Federal Rules of Procedure.

VII.

The above reports and orders of the Interstate Commerce Commission, annexed to the complaint of plaintiff Erie-Lackawanna Railroad Company as Exhibit A, and annexed to the supplemental complaint of The Baltimore and Ohio Railroad Company, et al., as Exhibits 1 and 2, are erroneous, unsupported by substantial evidence and without rational basis and violative of the applicable statutes and violative of due process. Among other things, the Commission:

(a) erroneously and inconsistently, in fact and in law, construed the statutory requirement of Section 5(2)(b) of the Interstate Commerce Act with respect to the definition and application of the "public interest" stated therein, having primarily employed the test set forth by the Transportation Act of 1920, rather than the standards enacted by the Transportation Act of 1940, and subsequent legislation, and particularly, affirmed that a reduction of tax receipts and loss of employment to railroad workers residing in intervening plaintiff communities cannot be considered in determining whether the merger is or is not in the public interest;

(b) erroneously failed to give appropriate consideration to current reports, information and statistics with respect to the income and prospects for the Pennsylvania Railroad Company and the New York Central Railroad Company, such current changed conditions are so substantial in nature as to alter the report approving the merger and to require that the order of the Commission be annulled and set aside;

(c) failed to give proper consideration to, and to make the requisite findings as to, the impact of the merger upon

employees of carriers other than those employed by the Pennsylvania Railroad Company and by the New York Central Railroad Company, as is stipulated in Section 5(2)(c)(4) of the Interstate Commerce Act, the public interest requirement of Section 5(2)(b) of the Interstate Commerce Act, The National Transportation Policy and by numerous federal enactments subsequent to 1940 relating to national employment goals such as the Employment Act of 1946 (15 U.S.C. Section 1021), Manpower Development and Training Act of 1962 (42 U.S.C. Section 2571) and Appalachian Regional Development Act of 1965 (40 U.S.C. App. 2)

(d) failed to impose employment protection conditions for employees of carriers by railroad, other than those employed by the Pennsylvania Railroad Company and New York Central Railroad Company, as is required by Section 5(2)(f) of the Interstate Commerce Act;

(e) erroneously and unsupported by substantial evidence, found that the Pennsylvania Railroad Company and New York Central Railroad Company, if required to continue as independent railroads, could not keep pace with their common carrier obligations;

(f) erroneously and unsupported by substantial evidence found that the Pennsylvania Railroad Company and New York Central Railroad Company have a persistent incapacity to produce profits from railroad operations;

(g) erroneously failed to give proper weight to the corporate financial statements of the Pennsylvania Railroad Company and New York Central Railroad Company as consolidated with their subsidiaries, in passing upon the transaction;

(h) failed to fully evaluate the evidence and make requisite findings as to the anti-competitive aspects of the proposed merger with respect to non-railroad subsidiaries and activities which may be embraced within the antitrust im-

munity conferred by Section 5(11) of the Interstate Commerce Act;

(i) failed to fully evaluate the evidence and make requisite findings as to the anti-competitive aspects of the proposed merger by reference to the relevant product and geographic markets;

(j) failed to fully evaluate the evidence and make requisite findings as to the anti-competitive aspects of the proposed merger by reference to the *carrier* and *market* competition within the railroad industry and between the Pennsylvania Railroad Company and New York Central Railroad Company;

(k) failed to fully evaluate the evidence and make requisite findings with respect to the interlocking directorates, combined purchasing powers, and reciprocity between shippers and carriers which would result from the proposed merger in view of the provisions of the Sherman Act, the Clayton Act and the Federal Trade Commission Act;

(l) erroneously, unsupported by substantial evidence, contrary to the National Transportation Policy, and contrary to Section 5(2)(b) of the Interstate Commerce Act, failed to make adequate findings with respect to the impact of the proposed merger upon the national defense and upon the postal service;

(m) erroneously and unsupported by substantial evidence, found that the Pennsylvania Railroad Company and New York Central Railroad Company, merged, would have the resources to withstand the competition of the Chesapeake & Ohio-Baltimore & Ohio system and the Norfolk & Western-Nickel Plate system, whereas alone, and not merged, the Pennsylvania Railroad Company and New York Central Railroad Company could not keep pace with their common carrier obligations.

(n) erroneously and unsupported by substantial evidence made findings with respect to the prospective financial con-

dition and future traffic of the Pennsylvania Railroad Company and New York Central Railroad Company;

(o) erroneously and unsupported by substantial evidence, found that the Pennsylvania Railroad Company and New York Central Railroad Company have shown that their annual savings from the merger will exceed $80 million after about eight years.

(p) erroneously and unsupported by substantial evidence found that the prospects clearly import that the merger will benefit rather than harm the Commonwealth of Pennsylvania.

(q) erroneously required the inclusion of the New York, New Haven and Hartford Railroad Company in the transaction in approving the merger without proper evaluation of the burden to be assumed by the merged system and indirectly by the public presently served by the Pennsylvania Railroad Company and New York Central Railroad Company, in violation of the Interstate Commerce Act;

(r) erroneously and unsupported by substantial evidence, found that the merger would have the effect of substantially increasing the fleet of equipment available to shippers;

(s) erroneously, unsupported by substantial evidence, and contrary to the requirements of the Interstate Commerce Act, permitted the Erie-Lackawana Railroad Company, The Delaware and Hudson Railroad Corporation and Boston and Maine Corporation to petition for inclusion in the merger;

(t) erroneously and beyond its statutory authority, by Appendix G, made possible in some instances, indefinite suspension of rates with the result that under the operation of Appendix G, rates might be suspended for a period longer than provided by Section 15(7) of the Interstate Commerce Act;

(u) erroneously and beyond its statutory authority, contrary to the National Transportation Policy and the antitrust laws, curtailed the right of the public to the benefit of competition between railroads concerning rates which are otherwise lawful and within the zone of reasonableness, but which would divert or tend to divert traffic from routes participated in by the Erie-Lackawanna Railroad Company, The Delaware and Hudson Railroad Corporation or Boston and Maine Corporation.

VIII.

The above report of the Interstate Commerce Commission is erroneous and violative of due process and the Administrative Procedure Act in that the Commission among other things:

(a) stated that its decision is based on the major issues involved, yet did not specify which issues were major in its 91-page report;

(b) adopted findings and conclusions which were inadequately set forth with particularity or enumerated by the hearing examiners in their report, to the extent that the Commission did not "modify or reject," thereby failing to set forth the findings and conclusions upon which the decision is based with sufficient clarity;

(c) failed to reopen the proceedings for the purpose of introducing the speech of witness Stuart T. Saunders, Chairman of the Pennsylvania Railroad Company, and for rehearing, based upon radically revised methods for operating the proposed merged company, and the availability of new merger studies;

(d) failed to reopen the proceedings and grant a further hearing for the purpose of amending the official notice taken of the pending proceedings in Finance Docket No. 21510, *Norfolk & W. Ry. Co. and New York, C. & St. L. Ry. Co. Merger* and Finance Docket Nos. 23832-3, *Norfolk & West-*

ern Railway Company-Merger-The Chesapeake & Ohio Railway Company, in violation of Section 7(d) of the Administrative Procedure Act (5 U.S.C. 1006(d));

(e) failed to reopen the proceedings and grant a further hearing with respect to the protective conditions imposed in Appendix G of the report prior to permitting the merger to become effective.

IX.

The deficiencies of the report and order specified in Paragraphs VII and VIII above would, if the order is not permanently enjoined, annulled and set aside, operate to the substantial damage and irreparable injury to intervening plaintiff communities, and that intervening plaintiffs are without an adequate remedy at law.

X.

WHEREFORE, intervening plaintiffs respectfully pray:

1. That in accordance with Section 2284(3) of Title 28, United States Code, the orders of the Interstate Commerce Commission complained of in this suit be temporarily restrained and stayed from taking effect until the hearing and determination by a three-judge court.

2. That a court constituted as required by the U. S. Code, Title 28, Sections 2284 and 2321-2325, consisting of three judges, of whom at least one shall be a circuit judge, be convened, and that said court as constituted and convened shall hear and determine this suit.

3. That the court of three judges issue an interlocutory injunction staying and suspending the operation of said orders of the Interstate Commerce Commission pending final hearing and determination of this suit.

4. That the court of three judges,, upon final hearing of this suit, enter a decree permanently suspending, enjoin-

ing, setting aside, and annulling the said orders of the Interstate Commerce Commission complained of herein.

5. That intervening plaintiffs have such other and further relief in the premises as to the court may seem required by equity and as may be deemed fit and proper.

Respectfully submitted,

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Dated: September 27, 1966

FREE COPY

No. 836

FILED
NOV 17 1967
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
AID ASSOCIATION FOR LUTHERANS,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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The Prudential Insurance Company of America,
Aid Association for Lutherans,
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November 17, 1967

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Supreme Court of the United States

OCTOBER TERM—1967

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
AID ASSOCIATION FOR LUTHERANS,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Appellants,

AGAINST

UNITED STATES OF AMERICA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, Aid Association for Lutherans, and Woodmen of the World Life Insurance Society are mutual life insurance companies owning $29,953,000 * of bonds of the Erie-Lackawanna Railroad Company (EL). Appellants were granted leave by the ICC to intervene in Finance Docket No. 21510 in which EL and others sought approval of their inclusion in the Norfolk and Western Railway (N&W) system.

Appellants challenge the final order of the ICC in F.D. No. 21510 only insofar as it fails to include a clear reten-

* Schedule 1 to Appellants' complaint in the District Court.

tion of jurisdiction for the protection of the EL bondholders. While the final order does include a general provision * retaining jurisdiction, that provision makes no specific reference to EL bondholders, and is so vague and indefinite as to leave the position of EL bondholders in doubt. Appellants ask that so much of the final order of the ICC as purports to deal with post-consummation relief be clarified to confirm the Commission's retention of jurisdiction to give EL's bondholders protection, on application, should future developments show it to be necessary and equitable.

---

* The order of the Presiding Officer, Commissioner Webb, (served December 22, 1966) herein (F. D. No. 21510) provided (p. 168):

> "Jurisdiction is reserved to receive such petitions, institute such investigations, and make such orders to accomplish *the objectives and purposes of the plan* for inclusion *and other terms and conditions prescribed herein,* and this reservation of jurisdiction is in addition to the authority to issue supplemental orders provided in Section 5(9) of the Act;" (All emphasis throughout this Jurisdictional Statement is added unless stated otherwise.)

In approving the Report and Order of Commissioner Webb, the ICC adopted the quoted provision. In its supplemental order of June 9, 1967, entered after hearing the objections of the EL bondholders, the ICC further provided:

> "It is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior report and order and in said supplemental report of the Commission, and to those orders which may be issued under section 5(9) of the Interstate Commerce Act;" (Not printed. Page 2 of Mimeographed Order.)

Such clarification, even if procedurally it should necessitate remand to the ICC, would require no delay in the Penn-Central merger or in EL's inclusion in the N&W system, which these Appellants have made clear throughout they believe is in the public interest and do not wish to see delayed.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The memorandum order of July 26, 1967, and the October 19, 1967, opinion of the statutory three-judge court convened in the Southern District of New York are not yet reported, but copies are attached to the Jurisdictional Statement of N&W in its appeal as Appendices A and B thereto, and said appendices are incorporated herein by reference. Appendix 1 hereto sets forth that portion of the District Court's opinion to which this appeal is directed. The Report of the Interstate Commerce Commission, dated June 9, 1967, is reported at 330 I.C.C. 780, and the Commission's report on reconsideration, dated August 10, 1967, as modified on September 1, 1967, is reported at 331 I.C.C. 22. Copies of the Commission's reports and orders have been lodged with the Clerk of the Court.

JURISDICTION

This suit was brought under 5 U.S.C. §704 and 28 U.S.C. §§1336, 2284 and 2321-25 to modify the supplemental order of the Interstate Commerce Commission,

dated June 9, 1967, in Finance Docket No. 21510, *et al.*, as supplemented by its orders dated August 10, 1967, and September 1, 1967. The judgment of the District Court dismissing this complaint was entered on October 19, 1967. Appellants' notice of appeal was filed in that court on November 3, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b).

QUESTIONS PRESENTED

1. Did the District Court err in holding that Appellants were not entitled to challenge the final ICC order because they themselves had not "developed a record at the hearing [before the ICC Examiner] and then come forward with specific suggestions," where the ICC had granted Appellants' petition to intervene and Appellants had filed timely exceptions based on the record already developed before the ICC Examiner?

2. Did the ICC violate the provision of Section 8(b) of the Administrative Procedure Act which requires findings, the requirement of Section 5(2) of the Interstate Commerce Act that the inclusion plan be "just and reasonable," and the express requirement in the ICC's initial order that the plan be "equitable to all parties involved," in failing to make any finding as to whether the plan is equitable to EL bondholders, and, despite the clear record developed before the ICC that the plan will jeopardize the EL bondholders' security, in failing to provide any appropriate safeguard?

STATUTES INVOLVED

The statutes involved in this case are: Administrative Procedure Act, §§7(d), 8(b), 10(a), 10(c), 10(e), 5 U.S.C. §§556(e), 557(c), 702, 704, 706; 28 U.S.C. §§1253, 1336, 1398(a), 2101(b), 2284, 2321-25; Interstate Commerce Act, §5(2), 49 U.S.C. §5(2). Also involved are Rules 19a and 82 of the Federal Rules of Civil Procedure. The text of these statutes and rules is attached as Appendix C to N&W's Jurisdictional Statement and is incorporated herein by reference.

STATEMENT

At the very outset, these Appellants wish to emphasize, as they did before the Commission and in the District Court, that they favor the prompt inclusion of EL in the N&W system. They ask only for the protection of their vital interests by having it made clear that the Commission retains post-consummation jurisdiction to afford relief to EL bondholders if future developments should so require. This clarification would require no delay in the inclusion of EL in the N&W system.

In this "Inclusion" case, the proceedings before the Commission were initiated by EL, the Delaware and Hudson Railroad Corporation (D&H) and the Boston and Maine Corporation (B&M), all of whom filed petitions for inclusion in the N&W. Such petitions were authorized by a condition (Appendix O) attached to the Commission's order which approved N&W's merger with the Nickel Plate and related transactions. *Norfolk & W. Ry. and New York, C. & St. L. R. R.—Merger*, 324 I.C.C. 1 (1964). Under Appendix O the Commission retained jurisdiction to direct inclusion of the three carriers if "found

consistent with the public interest . . . under such terms as may be found *equitable to all parties involved"* (324 I.C.C. at 148).

The Report and Order recommended by the ICC examiner, following hearings on the above petitions for inclusion, was served on December 22, 1966. The Commission ordered that exceptions thereto be filed on or before March 1, 1967. Within said time Appellants served and filed their petition to intervene and specific exceptions. By Order of March 7, 1967 the Commission permitted the Appellants to intervene and accepted the filing of their exceptions. No party objected to such intervention of Appellants or to the timeliness of the filing of said exceptions.

Appellants requested, and were granted, permission to participate in support of their exceptions in the oral argument before the Commission on April 20, 1967, without any objection or question being raised by any party.

In their exceptions submitted to the ICC (pp. 3-4) Appellants suggested different provisions to afford EL bondholders protection, including specifically its retention of jurisdiction by the ICC as they continued to do in their brief (pp. 35-36) and reply brief (p. 19) in the Court below.

Neither in its oral argument before the District Court nor in any of its briefs has the Commission, which set the time for the filing of exceptions, raised any question whatsoever about the timeliness or proper filing of Appellants' exceptions. Nor has the Commission ever contended that the right of Appellants to request review of its orders herein depends on their having actively participated in the hearing.

Nevertheless, in its decision below the District Court held Appellant bondholders were not entitled to request review because they had not "developed a record at the hearing and then come forward with specific suggestions" (Appendix 1 hereto).

This, we submit, is a novel holding presenting a procedural question of substantial importance not only in Section 5(2) proceedings (of which many are now pending and several others proposed) but also in other proceedings under the Interstate Commerce Act and in proceedings under various other Acts before administrative agencies.

The approval of this inclusion plan by the Commission, without a clear reservation of post-consummation jurisdiction to protect bondholders, raises substantial questions as to Section 5(2), which will have an impact far beyond the instant case. Indeed, N&W itself and another large railroad now have pending before the Commission their Section 5(2) application (in which they have finished putting in their opening case) requesting the use of exactly the same device used here to circumvent the rights of bondholders (ICC F.D. No. 23882).

The "phantom merger"-control device of circumvention used here is as follows:

> N&W, an important competitor of EL, is to form two new Delaware corporations, "NC" and "New EL". N&W will own all the common stock of NC, which in turn will own all of the stock (1000 shares) of New EL. New EL is to be formed as a "mere corporate shell" * for the purpose of merging pres-

* The term used by the Supreme Court in *County of Marin* v. *United States*, 356 U. S. 412, 418 (1958) in which it overturned the ICC's approval under §5(2) of a "paper transaction" designed by a carrier for the purpose of circumventing its legal obligation.

> ent EL into it, receiving EL's assets (subject to existing mortgages) and assuming EL's existing debt. N&W, however, is to assume no liability whatsoever to New EL or its bondholders.

Thus, there will be no public stockholders of New EL, interested solely in its financial well-being and constituting a safeguard to EL bondholders because of their right to call EL management to account unless it operates the road solely for its own benefit.* Present EL stockholders, upon the exercise of their right to convert (within five years or less) the NC preferred stock receivable by them into N&W common, will be interested only in the operations and revenues of N&W.

But the bondholders of EL, who are prior and paramount to its stockholders, will have to look for their income and security solely to New EL, which will be operated under the complete control of its competitor-parent, N&W. EL bondholders will have substituted a new obligor (New EL), whose lines betwen Chicago and Buffalo are paralleled by those of N&W (330 I.C.C. 829-30); and N&W will have the motive and the opportunity to use its control of New EL to increase the traffic and income of its own lines rather than those of New EL, *e.g.*, by diversion of traffic and other benefits from New EL, to the detriment of New

---

* N&W recognizes (Reply Brief of Sept. 25, 1967, p. 31 n.):

> "The provision for merger of EL into the new N&W subsidiary "New EL" is *to eliminate any minority interests* so that N&W will acquire 100% ownership of the equity in EL."

EL and these Appellants. The advantage to N&W of using its own lines in order to handle traffic diversions was clearly shown by lengthy testimony * concerning the former merger proposal (for which the present plan of control was substituted) of an N&W-appointed joint committee, whereby EL's present double-track line between Chicago and Buffalo would be converted into a single-track line and N&W's largely single-track line would be double-tracked. Clearly it would be to N&W's interest to handle on its own lines as much of EL's present traffic as it could divert, absent merger.

The incentive for N&W to operate New EL for N&W's benefit (to the detriment of EL bondholders) is greatly increased by the fact that N&W is a more efficient earner than EL—producing approximately 26¢ of net income per dollar of revenue as against EL's 6¢ (330 ICC at 808).

A further incentive for N&W to use its control of New EL to maximize its own revenues rather than those of EL, lies in the advantage to N&W of being able to buy in New EL's debt securities at substantial discounts. This—"[o]nce N&W has control of EL"— is one of the ways asserted by EL through which N&W will obtain substantially all of full merger benefits, without full merger of EL. (See its ICC Reply Brief of April 1, 1967, Point IV, p. 109.)

Apart from these strong incentives constituting realities which must be faced in situations of control generally, a further imperative need for protection lies in the special circumstances here that EL's bonds include more than $75,000,000 of *income* bonds, whose interest is contingent on earnings. The maximum (3 years) contingent interest which can accumulate on the income bonds (approximately

* EL's Stmt. 4, pp. 4-6, 31-37, 40, 48.

$10,000,000) has already accumulated. As shown in some detail at pages 23-24 of Appellants' brief below, there exists a highly compelling deterrent against N&W's permiting New EL to have in any future year net income available for contingent charges since it would first have to be applied to the payment of such large amounts of contingent interest before N&W could receive a penny of dividends from New EL—and then in the year immediately following any such payment the income bond interest would start accumulating again (up to the $10,000,000 maximum). By diverting EL income to its own lines N&W would receive benefits in a form other than dividends and without the necessity of discharging EL's accumulated income bond interest—possibly during the fifty years until the income bonds mature (in 2015 and 2020). By contrast, an EL controlled by public shareholders, as at present, would be interested in paying off accumulated interest as soon as possible in order that stockholders could receive dividends.

The District Court dismissed these considerations on the ground that:

> "The smaller traffic gains and control savings *estimated* for EL reflect N&W's *inability* in a control situation to do the very things the bondholders fear."

Mere "Estimates" by an N&W appointed committee, that with control of EL the net annual gain to N&W would be $1.8 million, as compared with $17 million under merger,* hardly reflect "inability" of N&W to realize the much larger gain at the expense of New EL's earnings. The Court thus fell into the same error, we submit, as the Commission in assuming that N&W will be careful not to realize more savings than have been estimated, without including in the plan any safeguard against the possibility that this as-

* Report of Dec. 22, 1966, p. 85.

sumption is not fully borne out. In this connection it is highly significant that EL, in its last filing with the Commission (its Reply Brief of April 1, 1967), repeatedly asserted that:

> "N&W will ultimately * obtain all, or substantially all, of full merger benefits,"

and

> "it is simply inconceivable that N&W will not ultimately * merge with EL (*unless N&W finds it can obtain most of that potential gain while EL is merely a 100% controlled subsidiary*)" (pp. 106, 107, et seq.).

The Court below further suggested that the safeguards bondholders now seek are "in large measure" provided by courts of equity. The case authority cited by the Court does not support the argument that courts of equity would be helpful in these circumstances.** The suggestion is also irrelevant since the plan should not have been approved under Section 5(2) unless the Appellants received equitable treatment. The general legal duty imposed by courts on the stockholders of a corporation with respect to its bondholders—to avoid a fraud on creditors—is obviously far narrower in scope than the express statutory duty on

---

* By "ultimately," EL suggested that it meant "in the early 1970's" (*Id.*, p. 106).

** Those cases [*Farmers Loan & Trust Co.* v. *New York & Northern Ry.*, 150 N. Y. 410 (1896); *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483 (1919)] are hardly relevant here. The former case involved what amounted to outright fraud on minority stockholders. The latter case is more properly viewed as a practical lesson on why judicial relief *after the fact* should not be relied on, since the litigation there, started in 1888, continued in the federal courts until 1929. See *Young* v. *Southern Pacific Co.*, 34 F. 2d 135 (2d Cir. 1929).

the ICC under Section 5(2) to approve the N&W's acquisition of the EL only on terms that are fair and equitable to all parties.

The approved plan contains nothing to prevent N&W from realizing the above advantages to itself at the expense and to the detriment of EL bondholders.

POINT I

The District Court erred in holding that Appellants are not entitled to challenge the final ICC order because they themselves had not "developed a record at the hearing and then come forward with specific suggestions", where the ICC had granted Appellants' petition to intervene and Apellants had filed timely exceptions based on the record already developed before the ICC Examiner.

In view of the fact that Appellants had been granted leave by the ICC to intervene in F.D. No. 21510 and had by timely exceptions urged upon the ICC the same objections that it later raised in the District Court, the District Court erred as a matter of law in dismissing Appellants' complaint on the above stated ground.

There was no need for Appellants to "develop a record" before the ICC since Appellants were content to rest on the record already developed through the many months of hearings. Further, there was no basis for making suggestions any more specific than those in fact advanced by Appellants as to an appropriate protective order for the EL bondholders since any such specific provision would depend upon and must be consistent with whatever terms the Commission might finally determine, then the subject

of so many exceptions by various parties, in this very complex situation.*

Contrary to the implication of the District Court that Appellants made no "specific suggestions," Appellants suggested, in all their requests for relief filed with the Commission and the Court, different forms of possible relief. Throughout such requests Appellants have asked, as the minimum relief to which they are entitled, a specific reservation of jurisdiction by the Commission. In this appeal Appellants ask only that the Commission's reservation dealing with post-consummation relief be clarified for their protection.

The statutory right to review an order of the Commission is not conditioned upon developing a factual record before it and then coming forward with specific suggestions. 28 U.S.C. §§2321-25. Appellants here are perfectly willing to stand or fall on the record in this case. The possible diversion of traffic from EL by N&W, and the incentives to do so, are fully developed in the record, and little could have been added thereto by the participation of bondholders in the hearings. If it is held that each holder of debt securities of a carrier must, to save his statutory right of appeal, develop a record before the Commission, the present lengthy proceedings of that Commission will be even more lengthy, and to no constructive end. In addition, apparently each indenture bond trustee

---

* The presiding judge in the court below, in referring to the problems to be worked out by the Commission, appropriately referred to the inherent "permutations and combinations" (Tr. of Sept. 28, 1967, p. 62).

(which are often numerous * and customarily do not participate in Section 5(2) proceedings) would, at its peril, have to "develop a record" and come forward with specific suggestions. It is respectfully submitted that proceedings under Section 5(2) of the Interstate Commerce Act neither call for nor contemplate the condition precedent imposed by the Court below.

Indeed, the Commission's General Rules of Practice clearly establish that when intervention is allowed, the intervenor becomes a party and is entitled to all the rights and privileges of a party. See Anderson, *ICC Practice and Procedure* 156 (1966). Rule 1.72(e) of those Rules provides:

> "Leave [to intervene] will not be granted except on averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner thereby becomes an intervener and a party to the proceeding." 49 C. F. R. §1.72(e).

This Court has long recognized that the rights of a party to an ICC proceeding who has a justiciable interest include the right to challenge the resulting order in those proceedings:

> "For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of §17 of the Interstate Commerce Act, the intervener becomes a

---

* There are 24 indenture trustees under different issues of EL bonds. The indenture trustees of The Pennsylvania Railroad and of the New York Central System together total 28 (Moody's 1967 Transportation Manual, pp. 707, 363, 656).

party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel. The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest. No case has been found in which either this Court, or any lower court, has denied to one *who was a party* to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission but did not do so, have been allowed to maintain such suits where the requisite interest was shown." *Chicago Junction Case,* 264 U. S. 258, 268-69 (1924).

POINT II

The ICC violated the provision of Section 8(b) of the Administrative Procedure Act which requires findings, the requirement of Section 5(2) of the Interstate Commerce Act that the inclusion plan be "just and reasonable," and the express requirement in the ICC's initial order that the plan be "equitable to all parties involved," in failing to make any finding as to whether the plan is equitable to EL bondholders, and, despite the clear record developed before the ICC that the plan will jeopardize the EL bondholders' security, in failing to provide any appropriate safeguard.

Section 5(2) of the Interstate Commerce Act specifically provides that in approving a transaction submitted to the ICC thereunder the ICC must find that the terms and conditions of the proposed plan are "just and reasonable." Pursuant to its authority under Section 5(2), the Commission required that any inclusion of EL be on "terms

equitable to all parties involved" (Appendix O, 324 I. C. C. at 148).

In determining whether the terms are just and reasonable it is the Commission's duty "to see that minority interests are protected" *Schwabacher* v. *United States*, 334 U. S. 182, 201 (1948). No merger which is unfair to bondholders could meet this criterion. As the Commission put it in *Cleveland, C., C. & St. L. Ry.—Operating Agreement*, 320 I.C.C. 430, 438 (1964):

> "This Commission has power in determining the public interest to consider whether the proposed agreement accords the minority stockholders *and bondholders* of the Peoria the just and reasonable treatment to which they are entitled. *An agreement which is not fair to all of the stockholders and bondholders could not be in the public interest.*" *

In *Schwabacher* this Court passed upon the rights of stockholders to equitable treatment under §5(2). The Court there held that the Commission has a special obligation to see that equity is done to a class of stockholders where, "the terms of the merger have been imposed by management interests adverse to [that] class of stockholders." 334 U. S. at 201. This special obligation is no less

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* In the recent Penn-Central decision, *B. & O. R. R.* v. *United States*, 386 U. S. 372, 456-57 (1967), Mr. Justice Douglas, dissenting in part, said (p. 210):

> "The question whether the Penn-Central merger is in the 'public interest' therefore cannot be resolved until the fate of these three protected roads is determined. They too have stockholders *and bondholders*. They too service shippers, consumers and communities."

meaningful where management's interest is adverse to the bondholders.

In light of the foregoing statutory requirements the Commission erred in approving the inclusion plan without making any findings as to whether or not the plan is fair and equitable to the EL bondholders. Nowhere in any of its Reports does the Commission ever refer to EL bondholders or their claims—except that in the first paragraph of its Report of June 9, 1967, it lists these interveners as having filed exceptions, without even stating their nature or basis. Nowhere does the Commission even mention the effect of the plan on these bondholders' interests or deal with their requests for protection—much less discuss them.

In failing to do so the Commission disregarded the requirement of §8(b) of the Administrative Procedure Act, 5 U. S. C. §557(c), that agency decisions

> "include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. . . ."

The Administrative Procedure Act's requirement of findings, conclusions and reasons on all material issues was pointedly designed to protect parties to administrative proceedings "against careless or arbitrary action." 2 Davis, *Administrative Law* §16.05, p. 446 (1958). This Court emphasized its determination to uphold the statutory requirement in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489 (1942):

> "An insistence upon the findings which Congress has made basic and essential to the Commission's

> action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' . . . Hence the requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence."

The interests of the intervening bondholders here are directly affected by, and they have great cause to be concerned with, the plan approved by the Commission. Nonetheless, the Commission has omitted even any reference to or findings concerning their objections or to state whether the plan is fair to them.

Unless the Commission's reservation of jurisdiction is sufficient to protect EL bondholders, N&W will be in a position materially to impair, if not destroy, substantial rights of these Appellants.

Appellants have no desire to delay putting the inclusion plan into immediate effect. Accordingly, Appellants at this stage only request a clarification of the general provision of the ICC order dealing with post-consummation relief.*

---

* As it presently reads, that general provision retaining jurisdiction (quoted at the outset of this Jurisdictional Statement) is so vague and indefinite as to leave the position of the EL bondholders in doubt, particularly since in its orders and reports the ICC nowhere refers to or deals with any of the points raised by the EL bondholders before the ICC.

Conclusion

For the foregoing reasons, jurisdiction of this appeal should be noted and the case set down for full hearing.

In the event this Court decides to dispose of this appeal without full hearing, we submit that the Court should clarify, and if necessary remand to the ICC, so much of the final order in F.D. No. 21510 as deals with post-consummation relief, in order to make clear the ICC's continuing jurisdiction to give EL bondholders relief, on application, should future developments prove that to be necessary and equitable.

November 17, 1967

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APPENDIX 1

Excerpt From Opinion of District Court (pp. 62 and 63)

"Complaint of E-L Bondholders.

"John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, Aid Association for Lutherans and Woodmen of the World Life Insurance Society, holding large amounts of E-L bonds, ask for "equitable safeguards necessary to prevent the circumvention of their rights as bondholders." Their main point is that "N & W will have the incentive to use its control of New E L to increase the traffic and income of its own lines rather than those of New E L, e.g., by diversion of traffic and other benefits from New E L, to the detriment of New E L" and its bondholders. The alleged incentives are various—N & W can make more money by handling traffic on its own more efficient line west of Buffalo; while the present E-L stockholders have an interest in earning net income and paying the interest charges in order to clear the way for the declaration of dividends, N & W will prefer that New E-L should not have net income available for payment of the contingent interest and arrearages on the income bonds; and it will be glad to see the price of E-L bonds depressed in order to facilitate market purchases or tender offers.

"Before submitting any plan for inclusion in N & W, E-L wrote thirteen of its major bondholders, including two of the plaintiffs and explaining both the greater advantages of merger and its disbelief that the Commission would approve this unless the E-L bondholders would consent to modification of the bonds. They refused. It was for this reason that E-L proposed stock control by N & W rather than merger, with attendant lesser economies and traffic gains and lower exchange ratios for its stockholders. The bondholders did not participate in the hearing before Commissioner Webb; on the last day for filing exceptions to his Report, they sought leave to inter-

vene and to file an exception asking the Commission to impose some sort of safeguard for their benefit.

"We find no merit in the bondholders' complaint. The Interstate Commerce Act contemplates acquisitions of control by sale of assets subject to existing indebtedness as well as by merger or consolidation, which, as E-L correctly thought, would have been inequitable to N & W unless E-L's debt was modified. The bondholders do not contend that the indentures securing their bonds forbid a sale of assets. The smaller traffic gains and control savings estimated for E-L reflect N & W's inability in a control situation to do the very things the bondholders fear. While no one can guarantee that N & W may not abuse its position, courts of equity will still sit. The safeguards the bondholders seek are furnished in large measure by the principle of fiduciary responsibility recognized in such leading cases as *Farmers Loan & Trust Co.* v. *New York & Northern Ry.*, 150 N. Y. 410 (1896), and *Southern Pacific Co.* v. *Bogart*, 280 U. S. 438 [*] (1919). If they wished more than this they should have developed a record at the hearing and then come forward with specific suggestions. Failing to have done this, they cannot properly request a remand."

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* The correct style and citation of this case is *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483.

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Nos. 778, 779, 830, 831, 832, 835, 836 and 836

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1967

THE PENN-CENTRAL MERGER AND N&W INCLUSION CASES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION TO AFFIRM

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MOTION OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

A. THE COMMISSION'S PROCEEDINGS

The background of the Penn-Central merger and its relation to the Norfolk and Western Inclusion proceeding are described in this Court's prior opinion (*Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372). To recapitulate briefly, the Pennsylvania Railroad Company (Penn) and the New York Central

Railroad Company (Central) filed a joint application on March 9, 1962, seeking the Commission's approval under Section 5(2) of the Interstate Commerce Act of their proposed merger (Penn-Central). Numerous railroads, States, municipalities, shippers and public bodies intervened, and the Commission's Bureau of Inquiry and Compliance participated. The eventual consensus—with the exception of Mr. Milton J. Shapp, a Pennsylvania citizen, and a few communities—was that, if properly conditioned, the merger would be in the public interest. The controversy centered upon the precise terms of the conditions which should be required.

One of the principal problems—and the one with which this Court was primarily concerned last Term—was the situation of three of the smaller Eastern railroads, Erie-Lackawanna Railroad Company (E–L), Delaware and Hudson Railroad Company (D&H) and the Boston and Maine Corporation (B&M). In 1964, when the Commission had approved the merger of the Norfolk and Western (N&W) and Nickel Plate railroads, it had imposed a condition (Appendix O) retaining jurisdiction for five years to permit the filing of petitions by E–L, D&H and B&M for inclusion in the N&W system. Appendix O further provided that N&W's consummation of the merger would constitute "acquiescence in and irrevocable assent to" such conditions, subject only to judicial review. *Norfolk & W. Ry. Co. and New York, C & St. L. R. Co.—Merger,* 324 I.C.C. 1, 148. E–L, D&H and B&M all filed petitions pursuant to Appendix O and expressed a preference for inclusion in N&W. However, since this matter

had not yet been determined by the Commission, the three roads also filed alternative petitions seeking inclusion in Penn-Central. They contended that inclusion in one of the two major systems was essential to their survival.

The Commission recognized in its first report in the Penn-Central Merger proceeding that it was "doubtful that, without inclusion in a major system, these three carriers could withstand the competition" of the merged Penn-Central, and concluded that it was necessary that E–L, D&H and B&M be "protected during the period necessary to determine their future" (327 I.C.C. at 532). *Sua sponte,* the Commission provided for two types of protection for the three roads: first, in the event the petition of one of the three lines for inclusion in N&W should be denied, that line would have the right within one year to petition for inclusion in Penn-Central;[1] and second, it provided unprecedented protective conditions—the so-called Appendix G conditions in the merger order—to assure the survival of the three lines pending their opportunity for actual inclusion in a major eastern rail system. The Appendix G conditions are in two basic categories: (1) traffic conditions, requiring Penn-Central to continue to maintain the rate and routing situation on traffic as to which E–L, D&H and B&M are com-

[1] In the event that the petitions for inclusion of the three roads into N&W were granted, the Commission declared it would take no further action on the alternative petitions for inclusion in Penn-Central, and that "[t]hey will be considered dismissed as moot without further order herein, concurrently with any grant in whole or in part of the petitions in *N&W* merger case becoming effective." 327 I.C.C. at 530–531.

petitive factors, as though the merger had not occurred; and (2) a revenue indemnity provision, requiring Penn-Central to indemnify each protected road to the extent that such road's revenue was proportionally less in a given year, in relation to the revenues of Penn-Central. Subject to such conditions, the Commission concluded that immediate consummation of Penn-Central would be in the public interest.

The revenue indemnity conditions were immediately attacked—both by the protected carriers, who urged that the terms were insufficient to fully protect them; and by competing railroads such as N&W, who took the position that such conditions would have an adverse effect upon them. In response, the Commission in its second report of September 16, 1966, reopened the proceedings for further hearings on the revenue indemnity conditions. Additional hearings were also ordered to consider the request of the three protected lines for the imposition of a "capital loss indemnity condition", under which Penn-Central would have been required to compensate the stockholders of the three lines for any loss in capital value—as reflected in the purchase price established for their inclusion in N&W—which the Commission might find to result from the Penn-Central merger. Providing that consummation of the merger "will constitute irrevocable assent on the part of the applicants [Penn and Central] to any modification" of the traffic and indemnity conditions resulting from the further hearings, the Commission authorized immediate consummation of the merger (328 I.C.C. at 328–329).

In the meantime, hearings on the application of the three roads for inclusion into the N&W system under Appendix O (the *Inclusion* case) had been completed and exceptions to the presiding officer's recommendations were pending before the Commission.

It was in this posture that the case came before this Court last Term. Emphasizing that it was not passing upon "the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties," this Court concluded that "in light of the findings as to the necessity for interim protection for the so-called protected railroads, the Commission erred in permitting the consummation of the merger prior to and without awaiting determination of the inclusion proceedings" (386 U.S. at 378).

Following the remand, the Commission completed its further hearings on the Appendix G conditions and the proposed capital loss indemnity condition, and its final decisions in both the Merger case and Inclusion case were served on June 12, 1967. In the Inclusion case, the Commission determined that inclusion of all three of the protected lines in N&W was in the public interest, and fixed fair and equitable terms for their inclusion.[2] It required N&W,

[2] It began with the experienced income of the three lines and adjusted their earnings for savings and gains that would result from inclusion in a larger system, and for such other items as anticipated relief from passenger deficits. An exchange of stock was ordered based upon the relative earnings of the three lines and N&W, as adjusted. In the case of D&H, N&W was permitted as an alternative to purchase the D&H assets for a discounted all-cash price.

under Appendix O, to purchase stock control of the three lines through wholly owned subsidiaries. 330 I.C.C. 780. The E–L stockholders thereupon voted immediate approval of the terms; the stockholders of the other two roads have not yet voted, although the D&H Board of Directors has voted to recommend approval.

In the Penn-Central case, the Commission concluded that Penn and Central "should be allowed to proceed with consummation of the merger" (330 I.C.C. at 361), but that revised Appendix G conditions were required to minimize any adverse effect of the merger which the three roads might suffer if there is any interim between Penn-Central's consummation and actual inclusion of the three into N&W (330 I.C.C. at 329). The Commission found that the protected lines' request for capital loss indemnity was moot, since it had concurrently found in the Inclusion case that none of the three lines would suffer any impairment of capital value as a result of the Penn-Central merger (330 I.C.C. at 360). The Appendix G traffic and revenue indemnity conditions were strengthened and new provisions were added to prevent any manipulation of the conditions which might harm competing railroads. The Appendix G protection will end for each protected line upon its actual inclusion; or, if no such inclusion is effected within one year from the final determination of the present inclusion petitions or of any new petition that may be seasonably filed, the protection "shall end when this Commission shall so order" (330 I.C.C. at 362).

Another railroad which claims to be affected by the merger is the Reading Railway. In the Commission proceedings, Reading stated that it would not oppose the merger if the standard routing and gateway conditions were imposed. Its lack of interest was buttressed by evidence furnished by Reading to the State of Pennsylvania, and introduced at the hearings, showing that no more than 3% of Reading's traffic could be affected by the Penn-Central merger.[3] And when this case was before this Court last Term, the Reading participated only to a limited extent, joining in the briefs filed by its family lines, B&O–C&O.

Subsequent to the Commission's original report, however, Reading sought a reopening of the proceeding, claiming that it would be adversely affected by the merger, and further that it was entitled to protective conditions similar to those adopted for E–L, D&H and B&M. The Commission held that Reading was bound by its original concession that the effect of the merger on it was inconsequential, and confined Reading's participation to showing the effects upon it of the Appendix G conditions and of the inclusion of New Haven in Penn-Central (330 I.C.C. at 357).

N&W, Reading, and other lines also contended that the revenue indemnity conditions created a community of interest between Penn-Central and the protected roads which would lead them to divert traffic to each other at the expense of the unprotected roads. The Commission found this contention to be completely unsupported. However, without objection from

[3] This evidence is reproduced as Appendix A to the Penn-Central brief in the court below.

Penn, Central, or the protected roads, the Commission also included a prohibition against such manipulation and a reservation of jurisdiction to give further relief against it, if necessary (330 I.C.C. at 355).

E–L, D&H and B&M are not the only smaller railroads whose future is interrelated with Penn-Central. The Commission also had to consider the rapidly declining New Haven, whose continued existence now appears to depend upon prompt assistance from a merged Penn-Central.

From the inception of the Penn-Central proceeding, the trustees of the bankrupt New Haven have taken the position that it can survive as a railroad only if included in Penn-Central. In its original report, the Commission concluded "that inclusion of New Haven's freight and passenger operations in this transaction will be consistent with the public interest, and our approval of the merger is conditioned upon such inclusion" (327 I.C.C. at 526–527). After that decision Oscar Gruss & Son, which holds some 14 percent of N–H's first mortgage bonds, urged on reconsideration that the merger should be postponed until N–H's actual inclusion. The Commission held that this would entail undue delay (328 I.C.C. at 306). Gruss sued to enjoin consummation of the merger and a bondholder's committee intervened. The court below at that time dismissed the complaint for lack of standing (*Oscar Gruss & Son, et al.* v. *United States,* 261 F. Supp. 386); on Gruss' appeal, this Court held in a *per curiam* order that, inasmuch as it had previously ordered the merger case remanded to the Commission, it would be "inappropriate to review the decision of

the District Court at this time." The lower court's order was accordingly vacated, with the provision that if appellant were "dissatisfied with the ultimate order of the Commission in the merger proceeding, it may attempt a fresh challenge in the District Court" (386 U.S. 776, 777).

The condition of the New Haven has steadily worsened since this case was last before this Court. In an opinion dated July 11, 1967, the reorganization court found that New Haven's cash depletion was "so serious, that if the present rate of loss continues, there will be insufficient left by late September to meet the payroll" (J.S. B24). Since that time the trustees have been able to stem the cash attrition to a slight extent, so that they now expect to be able to operate until early January, 1968.

The reorganization court had noted that "the New Haven will be faced with a desperately critical situation" if the Penn-Central merger is not consummated promptly, and that "it cannot possibly survive several months of waiting after the Penn-Central merger takes effect to be incorporated into that system" (J.S. B24). In response, the Commission on August 3, 1967, directed the trustees to negotiate a lease with Penn and Central to be "immediately available upon consummation of the Penn-Central merger." When the parties reported the impossibility of preparing a lease in time to meet the New Haven's needs, and submitted counterproposals for a loan from Penn-Central to the New Haven, the Commission issued an order, directing a hearing as to whether a lease, loan or other arrangement would assure continuation of N–H's operations

until its acquisition by Penn-Central. On November 21, 1967, the Commission served an order, providing reasonable and equitable terms for the inclusion of New Haven in the merged Penn-Central system. Subject to the approval of the reorganization court it authorized the immediate transfer of New Haven's assets to Penn-Central, and provided that the proceeds of the sale be made subject to the creditors' liens; and subject to such approval, it further required Penn-Central to lend up to $25 million to the New Haven over the next three years in return for trustees' certificates and to share the New Haven operating losses during the three-year period, until the transfer of assets in fact occurred.

B. PROCEEDINGS IN THE COURT BELOW

After the revised Appendix G and Inclusion decisions were served on June 12, 1967, the court below ordered expedited proceedings in the three cases in which the merger order had originally been challenged, and in the *Gruss* case. It also enjoined consummation pending its decision in the merger cases. Supplemental complaints were filed by all parties who continued to oppose consummation and/or the Appendix G conditions, except Milton J. Shapp and the City of Scranton, who now wished to litigate in another district.[4] E–L and D&H contended that the

[4] Shapp and Scranton intervened in proceedings begun in the District Court for the Middle District of Pennsylvania, *Borough of Moosic* v. *United States, et al.*, Civ. No. 10054. This action was stayed until October 1, 1967 and is now set for hearing December 15, 1967.

Commission should have included a capital indemnity provision among the protective conditions and that consummation should be postponed until after judicial review of the Inclusion order. B&M, which now supported the merger order, was realigned as a defendent.[5]

Proceedings challenging the Inclusion order began in the court below when D&H filed a suit attacking certain of its provisions; B&M and a group of E–L bond holders intervened as plaintiffs. N&W, which had filed a suit in another district challenging the inclusion order,[6] was joined in this action as an involuntary plaintiff. E–L supported the order.[7]

On October 19, 1967, the district court entered its opinion in the *Merger* case, the *Gruss* case, and the *Inclusion* case. It dismissed Shapp and Scranton with prejudice for want of prosecution (J.S. B8–B9)[8] The Appendix G conditions were sustained against claims by N&W and others that the revenue indemnity con-

[5] Similarly, Central Railroad of New Jersey (CNJ), which had opposed early consummation of the merger in the prior proceedings in this Court, has withdrawn such opposition while reserving the right to seek special protective conditions for itself.

[6] *Norfolk & Western R. Co.* v. *United States*, W.D. Va., Civil No. 67–C–51–R. The identical issues decided below are before the Virginia court. But that action has been stayed until further order of the court.

[7] While these proceedings were pending, the Commission entered orders on petitions for reconsideration by D&H and B&M in the Inclusion case, which satisfied D&H but denied the request of B&M (331 I.C.C. 22). Thereafter D&H withdrew its opposition to the Inclusion order.

[8] "J.S."—without a case number—indicates the Jurisdictional Statement filed in No. 778, which, in a separately paginated appendix, reproduces the opinion below.

ditions were an illegal pooling agreement under Section 5(1) of the Interstate Commerce Act (J.S. B10–B12); that they injured the unprotected roads by creating a community of interest which would lead Penn-Central and the protected roads to divert traffic from them (J.S. B13–B14); and that there was no substantial evidence of the merger being in the public interest so long as the Appendix G conditions remained in effect (J.S. B14–B15). It held that the Commission did not err in declining to adopt a capital loss indemnity provision or in not reserving jurisdiction to do so (J.S. B15–B17). Nor was the Commission required to anticipate and forestall stockholder rejection of inclusion by deciding that the three roads can never be included in Penn-Central (J.S. B31). The court also upheld the Commission's refusal to consider Reading's tardy demand for special protective conditions (J.S. B18–B22).

In the *Gruss* case the court, treating the New Haven bondholders as having standing, refused to enjoin consummation for their benefit because a merged Penn-Central system is essential to preservation of the New Haven's operations. The bondholder's complaints were dismissed without prejudice to any further relief they might wish to seek after the Commission's order for emergency relief to the New Haven.

In the *Inclusion* action, the court sustained the Commission's findings that inclusion of the three lines in the N&W system would be consistent with the public interest. No error was found in the Commission's forecast of earnings for E–L, D&H and B&M as part of a

larger system;[9] or in the refusal to consider inclusion of the three roads only in the broader context of N&W's proposal for a merger with the Baltimore & Ohio-Chesapeake and Ohio system;[10] or in its failure to forestall possible stockholder rejection of inclusion by finding that incorporation of any of the three roads in Penn-Central would be contrary to the public interest. The court rejected N&W's claim that the price for the three roads, when adjusted for the effects of the Penn-Central merger, was too high, and B&M's contention that the price was too low (J.S. B33–B49, B52–B56). It also concluded that the Commission's order must be taken to have encompassed the possibility that the stockholders of all three roads might not accept inclusion in N&W. In this connection, it took notice that E–L stockholders have already voted for inclusion and that D&H's board of directors has voted to recommend acceptance of the prescribed inclusion terms to its stockholders. The court also observed that N&W has a remedy before the Commission and the courts against possible efforts by B&M to join Penn-Central (J.S. B56–B61). Finally, the court held that the E–L bondholders were adequately protected from abuse of their interests by their ability to obtain equitable relief in the courts, and that their failure before the Commission to propose specific suggestions—short of N&W assumption of E–L's long-term debt—barred them from seeking a remand (B62–B63).

[9] Contrary to N&W's contention (No. 779, J.S. 8), the district court addressed itself to the specific steps in the Commission's determination of future earnings (see J.S. B38 to B42).

[10] Under this proposal, the DERECO plan, the three roads, together with the Reading and the Central of New Jersey, would be included into a merged N&W–B&O–C&O system.

ARGUMENT

When the Penn-Central merger was last before the Court, the principal question presented was whether it ought to be allowed to proceed before a haven had been found for three relatively small independent railroads which would be adversely affected by the merger (Erie-Lackawana, Delaware & Hudson and Boston & Maine) and before interim protective conditions for their benefit had been finally settled. Several parties—including the United States—argued that actual consummation of the merger should await determination of those matters, and the Court agreed. Now, however, when the case returns here a year later, this objection has been satisfied. Indeed, after extensive hearings, the Interstate Commerce Commission has determined that the public interest would be served by the inclusion of the three smaller roads in the Norfolk & Western system on terms specified and has formulated detailed provisions for their protection pending actual inclusion. And those decisions have been fully reviewed and sustained by the court below. In our view, nothing of substance remains.

A. SUMMARY OF THE CLAIMS ADVANCED

To be sure, nine appeals have been filed in this Court on behalf of twice as many parties. But the numbers do not accurately reflect the scope of the attack on the decision below. Most of the objectors seek very narrow relief for their own special benefit.

The three roads whose unsettled fate was of major concern a year ago are now all agreed that the Penn-Central merger may go forward without further de-

lay. Two of them (E–L and D&H) conditionally ask for additional protection from Penn-Central should their inclusion in N&W be delayed by a remand of of that order, but they are content if the Commission's decision is affirmed in all respects, as they urge (see No. 832). The third road (B&M) interposes no objection to immediate consumation of the Penn-Central merger on the terms now specified, whatever happens; its appeal (No. 833) seeks only an upward revision of the price fixed for its inclusion in N&W. Although the New Haven itself, through its trustees, states no complaint, two groups of its bondholders (Oscar Gruss & Son and First Mortgage 4% Bondholders Committee) ask that Penn-Central—which has been required to absorb the failing road and has agreed to do so—be ordered to take over management of the New Haven as soon as the merger of the two large roads is effected (Nos. 830 and 831).[11] Reading—an affiliate of C&O–B&O which was very late in asserting a separate claim—prays for special protection from a merged Penn-Central, without however suggesting that consummation of the merger ought to be delayed on that account (No. 834). The Pennsylvania and the New York Central accept the changed conditions imposed upon their merger and make no objection to the "Inclusion order permitting E–L, D&H and B&M to join the Norfolk & Western system. Bondholders of the Erie-Lackawana (John Hancock Mutual Life Insurance Co. et al.) complain (belatedly) only about the Commission's failure to ex-

[11] These jurisdictional statements were of course filed before the Commission's order of November 21, 1967 (see *supra*, p. 10).

pressly retain jurisdiction to protect them, in light of the form of inclusion specified by the Commission—a stock acquisition by N&W, rather than a full-fledged merger which would require N&W to assume E–L's debts (No. 836). And, finally, the City of Scranton and Milton Shapp, although again the only parties who challenge the Penn-Central merger on the merits, are restricted in this Court to a claim that they should have been allowed to transfer their suit out of the court below to another district (No. 835).

There remains the somewhat broader attack made by the Norfolk & Western and its ally, the B&O–C&O (Nos. 778 and 779). But, here again, the issues are quite narrow. Insofar as they ask further delay of the Penn-Central merger, it is basically on the ground that the Commission's Inclusion order does not settle the "ultimate fate" of the three smaller roads offered inclusion in the N&W system because one, and perhaps two, may decline the offer. Exploiting this possibility, these appellants tax the Commission with failing to make express findings with respect to terms of inclusion and protective conditions in the event less than all the three roads ultimately choose to join N&W. N&W also disputes the assumptions upon which the Commission required it to take in the three smaller roads, without however expressly contesting that their inclusion in its system upon proper terms would be in the public interest—a difficult stance, at all events, since it had conditionally agreed to absorb them in consideration of its merger with the Nickel Plate and repeated the offer more recently in its application to merge with the C&O–B&O system.

Even taken at face value, none of these complaints compellingly invokes plenary consideration here. We distinguish, however, between those claims which in our view are, for one reason or another, wholly inappropriate for review in this Court—including some of those advanced in No. 779, and most of those presented in Nos. 830, 831, 832, 833, 834, 835 and 836—and the remaining arguments in Nos. 778 and 779, which tender issues susceptible of meaningful review, although we believe them to be insubstantial.

B. MOST OF THE APPEALS PRESENT NO ISSUE APPROPRIATE FOR REVIEW IN THIS COURT

Some of the objections are directed to matters committed to the expert judgment of the agency which are not appropriate for judicial review, at least at this level. Despite some effort to phrase them in procedural terms, that is the true character of the contradictory claims of B&M (No. 833) and N&W (No. 779) challenging the price specified for the inclusion in N&W of one or more of the three smaller roads. As this Court remarked some years ago (in language quoted below, J.S. B45–B46), "An intelligent estimate of probable future values, and even indeed of present ones, is at best an approximation. The like is true of a forecast of future revenues. There is left in every case a reasonable margin of fluctuation and uncertainty." *Dayton Power & Light Co.* v. *Public Utility Comm'n.*, 292 U.S. 290, 310. When forecasts are required to reach a decision, the Commission's function is "to bring to bear upon the problem an expert judgment" and to make its own "analysis of the total situation." *United States* v. *Detroit Navigation Co.*, 326

U.S. 236, 241. See, also, *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481. Accordingly, with respect to the charges levelled at the terms of the so-called "Inclusion" order, we rest on the district court's opinion (J.S. B30–B56) and our brief below where they are fully answered,[12] suggesting that this Court has no duty to re-examine those questions.[12a]

Other objections do not merit further consideration here because their assertion below came too late. That is the posture of the E–L bondholders' complaint in No. 836. What they asked was impractical (see J.S. B62–B63), but, at all events, although forewarned, they chose not to participate in the hearing before Commissioner Webb and offered the Commission no evidentiary basis for a different form of unification

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[12] Joint Brief of the United States of America and the Interstate Commerce Commission, filed in Civil Action No. 67 Civ. 2451. On traffic questions, see pp. 16 *et seq.*; on E–L's commuter assistance, see pp. 39–41; on adjustments for nonrecurring items and changes in operations, see pp. 42–46; on B&M adjustments, pp. 47–50; and on assigning control savings and traffic gains to the three lines, see pp. 50–57. To be sure, the district court states the Commission might have avoided some of these questions and decided the proceeding on grounds less favorable to N&W (J.S. B44, B69); but it expressly disclaimed reliance on such grounds to sustain the Commission (J.S. B44).

[12a] N&W also argues that the district court considered the Commission's forecast of earnings only for their relevance to price and not for their relevance to whether there is any public interest in the inclusion of "deficit" railroads. (No. 779, J.S. 10). The argument begs the essential question of whether the three roads would experience future deficits. The district court sustained the Commission's findings that the smaller roads would not be deficit carriers as part of an enlarged N&W system (J.S. B38 to B42). Moreover, "[i]mplicit in appendix O [to the

for E–L's inclusion in N&W.[13] And like considerations foreclose the Reading's belated request for special protective conditions (No. 834). Having initially taken the position that it would not be seriously affected by the Penn-Central merger and introduced no evidence on the question in the original hearing, we submit that the Commission was fully justified—as the court below found (J.S. B18–B22)—in taking the Reading at its word and declining to reopen the record to accommodate an untimely change of position.[14]

N&W Nickel Plate order] is an obligation on N&W's part to assume a reasonable degree of risk." 330 I.C.C. at 841. N&W knew when Appendix O was adopted that the three roads were weaker lines. It is their very weakness which requires their inclusion, the Commission having found in the *Penn-Central* case that their preservation was essential to the public interest (327 I.C.C. at 529; 330 I.C.C. at 793) and that they must be included in a major system. That was, of course, the purpose of Appendix O and of Section 5(2)(d) of the Interstate Commerce Act, 49 U.S.C. 5(2)(d), under which it was adopted. As the court below observed (J.S. B–34): "Recognizing that voluntary consolidation would include only the more desirable candidates and would leave the weaker brethren to languish, Congress authorized the Commission to condition permission to consolidate on the inclusion of undesired lines." By consummating its merger with the Nickel Plate, and thus irrevocably assenting to Appendix O, N&W achieved gains and savings which will reach approximately $29 million per year (324 I.C.C. at 85–88) which the Commission found would not be affected by the required inclusion (330 I.C.C. at 801); it has already realized $12 million of this amount (330 I.C.C. at 791).

[13] While their objection to the form of unification comes too late, the courts of equity stand in the way of any attempt by N&W to abuse its control position over E–L to the prejudice of its bondholders (see J.S. B63).

[14] We may add that the district court, evaluating the late-tendered evidence which had been rejected by the Commission,

For similar reasons, the appeal filed by the City of Scranton and Milton Shapp (No. 835) presents nothing of substance. Plainly, their frontal assault against the merits of the Penn-Central merger is precluded from consideration here by their refusal to go forward in the court below. Nor is there merit in the contention of these parties, who had invoked the jurisdiction of the court below, that they should have been left free to litigate elsewhere. In the circumstances, the district court certainly did not abuse its discretion in refusing to allow them to withdraw a complaint voluntarily filed so as to clear the way for another court to entertain it in a fresh proceeding. And, after three warnings (J.S. A7–A11; No. 835 J.S. 2a–3a; No. 835 J.S. 5a–7a) and two defaults (see J.S. B8–B9), the City of Scranton and Mr. Shapp certainly cannot dispute their dismissal for want of prosecution.

Finally, we submit that the appeal of the New Haven bondholders (Nos. 830 and 831) presents no issue appropriate for review here—albeit the considerations are somewhat different in this instance. We do not tax these parties with any delinquency. Yet, insofar as they insist on complete inclusion of the New Haven before the Penn-Central merger is consummated, their suggestion is impractical and unnecessary.

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concluded that "the new evidence sought to be offered was scarcely persuasive." (J.S. B21). The lower court further noted that, while the new evidence did not purport to estimate how much traffic would actually be diverted to Penn-Central, it "admitted * * * that the traffic most likely to be diverted was the traffic exchanged with NYC at Newberry Junction—the same traffic that Reading's President discussed in his 1962 letter to the Commonwealth of Pennsylvania" which suggested a diversion amounting to no more than 3 percent of Reading's total traffic (*ibid.*).

The reorganization court and the court below have both expressed the opinion that the New Haven cannot survive several months unaided (see J.S. B24–B29) and no one disputes that hard reality. Nor is it challenged that the only source of that aid is a merged Penn-Central, which has now been required to furnish it immediately upon consummation.[15] Accordingly, if the New Haven is to survive as a railroad, it must allow consummation of the Penn-Central merger before its own inclusion can occur. To be sure, there is the alternative of liquidation, but that solution, whatever its appeal to the bondholders, must be dismissed as inconsistent with the Commission's uncontradicted finding that continuance of the New Haven's passenger and freight operations is important in the public interest. Cf. *R.F.C.* v. *Denver & R.G.W.R. Co.*, 328 U.S. 495, 535–536.

At all events, however, immediate inclusion of New Haven is unnecessary to give the bondholders protection. The Commission has retained jurisdiction to adjust the price in the event New Haven experiences traffic diversion to the merged road. Moreover, subject to the approval of the reorganization court the Commission has now authorized an immediate transfer of the New Haven's assets to the merged road—which could bring an early end to the operating losses being suffered by the New Haven estate—and it has further required Penn-Central to assume a portion of the New Haven operating loss prior to its actual inclusion.

[15] See the Commission order of November 21, 1967, summarized in the Statement, *supra*, p. 10, copies of which have been lodged with the Clerk of the Court. That order also advanced inclusion of the New Haven by approving the price agreed upon by Penn-Central and the New Haven Trustees.

C. THE REMAINING CLAIMS PRESENT NO SUBSTANTIAL QUESTION

We turn now to two contentions advanced by the appeals in Nos. 778 and 779 which seem to us to present issues proper for review in this Court, albeit we believe they are without substance.

1. THE CLAIM THAT THE FATE OF THE THREE PROTECTED CARRIERS HAS NOT BEEN SUFFICIENTLY DETERMINED TO PERMIT PRESENT CONSUMMATION OF THE PENN-CENTRAL MERGER

One can debate whether this Court's prior opinion required that the Penn-Central merger be delayed only until the conclusion of the then pending "Inclusion case"—involving the petitions of E-L, D&H and B&M to be included in the N&W system—whatever the result there; or, rather until an appropriate haven had been found for each of these roads, even if that required further proceedings. Although either reading is possible,[16] we may accept the latter interpretation since, as it happens, the inclusion order, affirmed by the court below, does provide a home for each of the roads. The charge is, however, that the Commission's order is insufficient predicate for the Penn-Central merger because the mere *offer* of inclusion does not settle the "fate" of the affected roads until it is accepted by them.

a. At the outset, we note that N&W asks far more than the smaller roads whose fate is directly involved. Last Term, E–L, and D&H—supported by the United States—sought delay of the Penn-Central merger only until disposition of their petitions to be included

[16] Compare the references to culmination of the pending "inclusion" proceedings, 386 U.S. at 378, 390, 392, with other passages adverting to the "ultimate fate" or "future" of the three roads, 386 U.S. at 378, 390.

in the N&W system, and, now, all three roads are content to allow consummation to proceed. Moreover, there is not the slightest intimation in the Court's opinion that the Commission was required to do more than offer the potential victims of the merger a safe haven on equitable terms.

The present contention, then, cannot invoke the interest of the affected roads or rest on any ruling by this Court. Judged on its own merits, the argument must fall. The major flaw of N&W's insistence that the Commission delay the Penn-Central merger until and unless each road is actually committed to inclusion in a major system is that it ignores the statutory limitations on the Commission's powers. Under Section 5 of the Interstate Commerce Act, the Commission can only determine whether, and upon what conditions, carrier-initiated proposals for merger or inclusion will be in the public interest; the final decision to accept or reject the terms upon which a unification is approved remains with the stockholders of the carriers involved. Here, because N&W consented in advance as a condition of its merger with Nickel Plate, the Commission may compel N&W to offer inclusion to the three smaller roads on specified terms; but that action exhausts its power; the Commission cannot order the beneficiaries of the order to accept the proffered home.

Against this background, the suggestion that consummation of the Penn-Central merger should await the decision of the stockholders of D&H and B&M [17] whether to accept or reject the offer of inclusion in

[17] As noted in the Statement, the E–L stockholders have already voted in favor of inclusion.

N&W is without meaning. Indeed, nothing can turn on that vote. We may suppose—contrary to the unanimous recommendation of their board of directors [18]—that the stockholders of D&H reject inclusion, although the terms are found to be equitable. Should this happen, the Commission cannot force acceptance; nor can it adjust the terms unfairly to N&W merely because D&H insists on a better price. Is the Penn-Central merger to be upheld indefinitely on this ground? Surely, not.

b. Nor is there merit in the further suggestion that the Commission was obliged to determine, in the alternative, whether it would approve inclusion of one or more of the protected lines in Penn-Central, in the event the N&W inclusion terms should be rejected by their stockholders.

Such a speculative determination would have been premature before any road had in fact refused the proffered haven of N&W—an eventuality not yet realized. The Commission is not required to assume that the solution which it finds in the public interest and fair to all parties will be blocked by stockholder action. The question of possible inclusion of one or more of the small roads in Penn-Central presents

[18] It should be noted that N&W's predictions as to the probable action of the D&H and B&M stockholders is mere speculation. With respect to D&H, the speculation is based entirely upon a statement of D&H's President, made *before* the D&H Board of Directors unanimously voted to recommend to the stockholders that the inclusion terms be accepted. As to B&M, it appears that N&W is simply assuming that because the terms fixed by the Commission are below the current market price and are being challenged in this Court by B&M, they will necessarily be rejected by the stockholders. At this point, neither D&H nor B&M stockholders have voted on the inclusion terms.

difficult and highly controversial issues which the Commission could not resolve without extensive further hearings. In the circumstances, we submit the Commission was fully justified in declining to undertake those inevitably protracted proceedings in advance of the necessity for so doing. And, of course, without a record basis, it would have been improper to foreclose the Penn-Central alternative in order to pressure the stockholders of the affected roads into accepting the present offer of inclusion in N&W.

At all events, it is not clear how the public interest would be prejudiced by allowing the merger to go forward before the Commission decides whether any road that refuses to join N&W may be included in Penn-Central. To be sure, it was argued last Term that the merger ought not be consummated until it was determined whether E-L, D&H and B&M could be included on equitable terms in N&W consistently with the public interest—because, if that solution were found inappropriate for any reason after the merger had been consummated, the Commission might be left with no option but to allow these roads to join Penn-Central, no matter how unattractive that alternative. But that is no longer the situation. Having offered the three roads an appropriate home on fair terms, the Commission is now free to judge any request to join Penn-Central on the merits. If competitive considerations foreclose that solution, theowners of the affected road may suffer. But the Penn-Central merger —determined to be in the public interest—cannot be halted because particular interests have indulged in a rash gamble which the Commission is powerless

to prevent. It is noteworthy that the applicants for inclusion do not themselves complain that their choice is embarrassed because they have not been advised whether this is their only chance for inclusion.[19]

On the other hand, it may be that inclusion of the affected roads in Penn-Central can be so conditioned as to avoid the New England rail monopoly that N&W portrays. And, finally, there remains the possibility that any road opting against present inclusion will be permitted to join an N&W–C&O–B&O system, if the application for that consolidation is ultimately approved—a matter now closer to resolution.

We conclude that—consistent with this Court's prior decision—the Commission has fully met its responsibility by providing E–L, D&H and B&M the opportunity for inclusion in a major rail system on equitable terms and that there remains no justification for any further delay in consummation of the Penn-Central merger.

2. THE CLAIM THAT THE COMMISSION'S ORDERS ARE PREMISED ON THE FALSE ASSUMPTION THAT ALL THREE AFFECTED ROADS WOULD NECESSARILY ACCEPT INCLUSION IN N&W

We have just discussed the argument that—because of this Court's mandate or for independent reasons—consummation of the Penn-Central merger cannot proceed until the affected roads have actually committed themselves to inclusion in N&W or another major system. There is, however, a further con-

[19] The Commission has, however, advised them that rejection of an offer of inclusion in N&W will result in loss of their right to petition for compulsory inclusion in a Penn-Central system (330 I.C.C. at 868–869).

tention advanced in Nos. 778 and 779—related but discrete. It is that, even if, upon proper findings, the merger could go forward before stockholders of D&H and B&M vote, this would now be improper because neither the Commission's inclusion order nor its merger order adverts to the possibility that one or more of the affected roads will reject the offer to join N&W.

a. We turn first to the claim that the inclusion order, in concluding that the public interest would be served by N&W's absorbing the three small roads, ignores the eventuality that less than all of the lines offered a home with N&W will accept it. The premise is erroneous, as an examination of Appendix F to the *Inclusion* decision reveals (330 I.C.C. at 868). The Commission there explicitly ruled that N&W should acquire control of D&H and B&M only on condition that it acquired control of E–L; and that it should acquire control of B&M only if it acquired control of both of the other carriers. Thus the order plainly contemplated the possibility of stockholder rejection and accordingly provided for inclusion of E–L alone, E–L and D&H or all three.[20]

These provisions, of course, reflect the facts of geography upon which the public interest largely turns. E–L provides single line east-west freight service between the southern tier of New York and Chicago,

[20] Appendix F also provides that if the stockholders of any petitioner reject inclusion, their petition for inclusion in the Penn-Central system is dismissed and that if N&W does not acquire control of E–L or of E–L and D&H, the petitions of D&H and B&M, or B&M, respectively, in the *Inclusion* case will be dismissed. (330 I.C.C. at 868–869.)

and serves as the physical connection between N&W and D&H and B&M; D&H is a bridge carrier linking E–L and B&M; B&M serves northern and central New England. The Commission found that inclusion of E–L in N&W would enable the enhanced N&W system to compete more effectively for traffic in the New York-New Jersey Port of New York area and that D&H would form an important link between a combined N&W–E–L and New England.[21] Thus the Commission implicitly found that inclusion of E–L, or E–L and D&H alone, would greatly strengthen N&W's ability to compete with Penn-Central and would provide the protection for these carriers contemplated by the Commission's ruling in the Penn-Central case and this Court's decision in *Baltimore and Ohio* v. *United States, supra.* 330 I.C.C. 792–796, 822, 868.

b. N&W also argues that the Commission failed to take note of the effect of non-inclusion of one or more of the lines on the price of the roads to be included. The fact is, however, that the differences are very slight. If D&H or B&M declined entry into the N&W system, some traffic revenue the included roads would otherwise gain from rerouting would be denied them. But this would reduce E–L's net income by only $500,000, if both D&H and B&M stayed out, and D&H's income by only $200,000 if B&M remained in-

[21] There is no basis for N&W's contention that if B&M remains independent D&H will become "a bridge line to nowhere." B&M has an important interchange for New England traffic with D&H which will be as significant to it if D&H is part of N&W as it is now. B&M's own self interest requires it to preserve routings over D&H.

dependent.[22] As to increased losses to Penn-Central, the Commission found that, without B&M, these losses would be somewhat larger, but that the record permitted no reliable estimate of the exact effect (330 I.C.C. at 840).[23] N&W, which was best situated to furnish evidence as to how inclusion of the three roads into its system would affect it and them, came forward with no independent studies as to the effects of inclusion on the three roads or itself either from the standpoint of traffic gains or of losses to Penn-Central (330 I.C.C. at 833–835). At all events, N&W's investment in the three roads is protected by the cushions and other advantages (*e.g.*, tax savings) which the Commission provided (see J.S. B50 *et seq.*).

Moreover, if the Commission had undertaken to recompute in detail the price for each road in the light of the possibility that the stockholders of D&H or B&M might reject inclusion, the Inclusion proceedings would have been bogged down in lengthy and arid "what if" proceedings. At best, estimates of how

[22] The Commission's findings show D&H's contribution to E–L's revenues to be $633,775 and B&M's to be $602,611 (330 I.C.C. at 834, table, line 2). The omission of this traffic reduces E–L's net earnings by only $500,000, and its earnings per share of $1.99 computed by the Commission (at 816) to $1.89; such a reduction affects neither the public interest in E–L's inclusion nor the financial terms. Similarly, if D&H's traffic gains resulting from rerouting exclude B&M's contribution of $491,402 (330 I.C.C. at 834, table, line 3), on the supposition B&M will vote to remain outside the N&W system, D&H's annual net earnings are reduced by only $160,000; D&H earnings per share of $3.84 (331 I.C.C. at 33) become $3.74 and do not affect the result reached by the Commission.

[23] The Commission made no separate finding as to the impact on E–L if both D&H and B&M stayed out, but the same considerations are obviously true.

traffic will move are uncertain—involving as they do a prediction of the individual responses of thousands of shippers (see 330 I.C.C. at 833); when combined into widely varying hypothetical possibilities they become sheer speculation. N&W's arguments demand detailed findings and predictions which go beyond the limits of the administrative process. Cf. *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523, 538–539. The Commission cannot provide a solution to every permutation and combination of events that ensue from its orders. It can only define equitable terms that offer an opportunity to be included in a more rationally structured railroad system. Reasonable application of Section 5 of the Interstate Commerce Act, as presently written, does not require more.

c. Finally, N&W objects that the Appendix G conditions will become indefinite if either D&H or B&M reject inclusion and that there has been no finding that this is consistent with the public interest. Within the limits of its powers, however, the Commission has provided for this contingency. Under the very terms of Appendix G (330 I.C.C. at 362), the protected period extends only until disposition of the pending petitions for inclusion or one seasonably filed, and if no actual inclusion is accomplished within one year of the final determination of such petition, the protective conditions may be altered or terminated by order of the Commission. In addition, under Appendix F to the Inclusion order (330 I.C.C. at 868), if the stockholders of any of the three roads reject the terms of inclusion in N&W, its petition for inclusion in Penn-Central will be considered dismissed. There is little more that

the Commission can do under its existing powers. It would frustrate the purposes of the Transportation Act of 1940 to allow stockholder self-interest to delay indefinitely a merger which the Commission has found to be in the public interest, and whose prompt consummation is vital to the survival of another road, after reasonable terms for inclusion of carriers in a major carrier have been established.

CONCLUSION

For the reasons stated, we submit that the judgment of the district court should be affirmed.

Respectfully submitted.

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Nos. 778, 779, 830, 831, 832, 833, 834, 835, 836.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*, *Appellants*

NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant*

OSCAR GRUSS & SON, *Appellant*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *Appellant*

ERIE-LACKAWANNA RAILROAD COMPANY, *et al.*, *Appellants*

BOSTON AND MAINE CORPORATION, *Appellant*

READING COMPANY, *Appellant*

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*, *Appellants*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM OF APPELLEES, RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

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READING COMPANY, *Appellant*

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*, *Appellants*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,[1] move, pursuant

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[1] Hereinafter referred to as the "New Haven Trustees." The United States District Court for the Southern District of New York is referred to as the "district court." The opinion, F. Supp. (October 19, 1967) of the district court, from which the instant appeals were taken, is set forth as Appendix B to the jurisdictional statement of Baltimore and Ohio Railroad Company ("B&O J.S."). "R." refers to the record certified to the Court by the district court. Other abbreviations herein are as used in the district court's opinion.

to paragraphs 1(c) and 1 (d) of Rule 16 of the Court, that the judgment of the district court in the *Penn-Central merger case* be affirmed for the following reasons:

I.

Whatever may be the legitimate interests of N&W in securing final determination of its contentions in the *N&W inclusion case,* judicial protection of such interests neither warrants nor requires further delay in consummation of the Penn-Central merger.

Whatever might prove to be the right of E-L and D&H to seek capital indemnification were there a downward revision in the terms for their inclusion in N&W, the Commission's reservation of jurisdiction provides adequate protection for these railroads following consummation of the Penn-Central merger.

II.

The course proposed by Gruss and the Committee would frustrate the New Haven's inclusion in Penn-Central, the very objective which they claim motivates their appeals.

No stay of consummation of the merger is necessary to ensure effective judicial review of all issues raised by these appellants concerning the final determination of fair and equitable terms for the New Haven's inclusion.

III.

The remaining appeals raise issues which do not go beyond simple disagreement with procedural and

policy determinations which have been delegated to the Commission and which manifestly were properly considered and determined by the Commission.

The Commission and the district court carefully followed and applied the Court's mandate of a year ago, and more than five years of administrative and judicial proceedings should now come to an end.

STATEMENT

In *Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372 (1967), the Court enjoined consummation of the Penn-Central merger, authorized by orders of the Commission dated April 6 and September 16, 1966, pending further proceedings before the Commission in accordance with the Court's opinion. On June 9, 1967, the Commission issued its further report and order in the *Penn-Central merger case,* 330 I.C.C. 328, and its report and order in the *N&W inclusion case,* 330 I.C.C. 780, *modified,* 331 I.C.C. 22.

In *Oscar Gruss & Son* v. *United States,* 386 U.S. 776 (1967), the Court vacated the district court's adjudication in 261 F. Supp. 386 (1966) and remanded the case to the district court with the observation that "should appellant [Gruss] still be dissatisfied with the ultimate order of the Commission in the merger [Penn-Central] proceedings, it may attempt a fresh challenge in the District Court" (386 U.S. at 777). Gruss and the Committee filed supplemental complaints following the Commission's report and order of June 9, 1967.

Hearings on the first step of the New Haven Trustees' plan of reorganization which provided for a sale of the New Haven's assets to Penn-Central, pursuant to an agreement among the New Haven Trustees, PRR and NYC, commenced before the Commission on January 16, 1967. These were consolidated with hearings on the New Haven Trustees' plan of inclusion of the New Haven in Penn-Central and with related applications of PRR and NYC. The hearings concluded in May, 1967, and oral argument and briefing before the Commission were completed in July.

On April 5, 1967, following the Court's order in *Baltimore & Ohio,* the New Haven Trustees filed their petition for order no. 441 (R. 1967-1969) in the New Haven's reorganization proceeding.[2] They stated that there was a possibility that consummation of the Penn-Central merger might be substantially delayed or even aborted if protracted litigation should ensue after the determination by the Commission of the issues remanded to it. In view of the New Haven's then rapidly deteriorating financial condition, the New Haven Trustees informed the reorganization court of the remaining sources of financial assistance and requested instructions whether the New Haven's operations, which would involve additional substantial losses, should be continued. The Committee filed a cross petition seeking termination of the reorganization proceeding "to permit the orderly liquidation of the Debtor by the creditors" (R. 1973A).

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[2] *In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor,* Docket No. 30226 (D. Conn.).

On July 11, 1967, Circuit Judge Robert C. Anderson, sitting by designation as the reorganization court, entered a Partial Ruling (R. 775-777), stating that, in view of cash attrition, the Commission should consider means for effecting the New Haven's inclusion in Penn-Central on an interim basis immediately upon consummation of the merger. On August 1, 1967, noting Judge Anderson's views, the Commission modified its June 9 order and found that provision should promptly be made for preservation of the New Haven's operations pending resolution of the issues involved in their final inclusion in Penn-Central (R. 1976A). The Commission considered that an appropriate means for interim continuation would be to require PRR and NYC upon consummation of their merger to conduct the New Haven's operations under a lease (R. 1977-1978).

On September 1, 1967, the New Haven Trustees advised the Commission that it would not be feasible to effect a leasing arrangement by January 1, 1968, when it was anticipated that the New Haven would lack operating funds. As an alternative, the New Haven Trustees proposed a form of *de facto* inclusion whereby Penn-Central would be required to share in the New Haven's operating losses pending its *de jure* inclusion and to lend the New Haven up to $25 million over a three-year period.[3] (R. 1983-2024) PRR and NYC

[3] The New Haven Trustees proposed that Penn-Central be required to assume New Haven's "Adjusted Net Deficit." The formula for determination of "Adjusted Net Deficit" is summarized in the district court's opinion (B&O J.S. B-26). In its summary, the district court notes, as was then reported by the New Haven Trustees, that some $5 million of operating costs were not included in the

concurrently proposed that Penn-Central would finance the New Haven on terms substantially similar to those suggested by the New Haven Trustees, but did not propose participation by the merged system in the New Haven's operating losses.

On September 12, 1967, the Commission modified its August 1 order, as requested by the New Haven Trustees, to require that consummation of the merger would constitute

> "an irrevocable assent . . . to lease the NH *or enter into a loan or other appropriate arrangement* with the NH for continuation of the NH's operations under such just, reasonable, and equitable terms as the Commission may require; provided, however, that such consummation shall not foreclose judicial review of any decision the Commission may make with regard to the effect operations under such arrangement might have upon the final adjustment of the inclusion terms" (B&O Applic. Stay, App. 2, p. 3, emphasis added).

There followed hearings, oral argument and briefs to the Commission.

By a second supplemental report, dated November 16, 1967, the Commission issued findings with regard to the terms for the New Haven's inclusion in Penn-Central, approved as a first step in the New Haven's reorganization a prompt conveyance of its assets to Penn-Central and fixed terms for interim financing and

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formula; at the Commission's hearings upon the Trustees' proposal, however, the Trustees corrected their former statement and showed that the formula for "Adjusted Net Deficit" did, in fact, include all unpaid operating costs.

sharing of the New Haven's operating losses by Penn-Central pending the New Haven's inclusion in Penn-Central.[4] The Commission specifically provided that consummation of the merger would constitute an irrevocable assent by Penn-Central to enter into such interim financing arrangements (App. A-4-5).

The cash problems adverted to by the Commission in its November 16, 1967 report had their genesis early in 1967. During the course of this year, there has been an ever increasing deterioration of the New Haven's operating results and cash position.

As to operations, for the seven months ending July 31, 1967, the New Haven's deficit in net railway operating income was $13.4 million, compared with $7.9 million in the comparable period of 1966 (R. 1962-1962A).

As to the cash position, on November 14, 1967, following the Court's order of November 9, 1967, fixing procedures before the Court in the instant proceeding, the New Haven Trustees filed a supplement to their petition for order no. 441 by way of a supplemental report on the financial condition of the New Haven.[5] Although stating that they were negotiating with public authorities for cash assistance, the New Haven Trustees advised the reorganization court that their purpose was

[4] It is understood that copies of the Commission's second supplemental report and accompanying orders, dated November 16, 1967, have been furnished to the Court. The second supplemental order and the order regarding interim financing, which accompany such report, are attached hereto as Appendix A and Appendix B, respectively.

[5] A copy of the supplement to petition for order no. 441 is attached hereto as Appendix C.

"to make it clear that at this juncture cash is not available to insure train service beyond early January" (App. C-5). The New Haven Trustees estimated that at December 31, 1967 the New Haven's working cash balance would be approximately $2 million (App. C-4). The New Haven's average weekly cash requirement for wages and supplies alone is approximately $1.75 million (R. 1962A). For the ten months ending October 31, 1967, the New Haven's cash attrition was $5.17 million (App. C-3).

The only alternative to inclusion of the New Haven's operations in the Penn-Central system is liquidation. In its August 1, 1967 order, the Commission again rejected all contentions that there may be solutions to the New Haven's problems other than inclusion in Penn-Central (R. 1977).

The district court found that the steps which are "urgent to avoid cessation of NH's vital service" are early consummation of the Penn-Central merger, and a Commission order prescribing some form of financial aid that will permit the New Haven's operations to continue beyond December 31, 1967 (B&O J.S. B-29). The district court concluded that "no one has contested the forecast of the NH Trustees that their cash will run out at the end of 1967," and stated that it was

> "unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed; indeed we believe we have no right to do so" (B&O J.S. B-70).

The Commission's report of November 16, 1967 provides the means for continuation of the New Haven's operations between consummation of the Penn-Central merger and the New Haven's inclusion. As stated by the Commission:

> "The choice is clear: either the public at large is forced to stand in the wings awaiting progress in transportation while the NH creditors haggle on stage over the wasting corpus of the NH estate, or, on the other hand, the overall objectives of the law are served, with the broad public interest brought into the scene in the form of improved service through a consummated Penn-Central merger including an operational NH, while the NH creditors are freed to litigate at will the distribution of their estate" (slip opinion, p. 14).

I. THE CONTENTIONS OF THE RAILROAD APPELLANTS*

The Commission has now satisfied E-L and D&H with respect to the protective conditions which were the primary issues they argued to the Court one year ago.

N&W's and C&O-B&O's present contentions do not differ in essence from those previously made. The Court summarized those contentions as follows:

> "the C&O-B&O group and the N&W system maintain that the conditions of the April 6, 1966 order give the protected railroads a vested interest in the Penn-Central merger which would result in the protected

* Reading appears not to raise the same questions as the other railroad appellants but to limit its appeal to matters of traffic protective provisions.

railroads diverting traffic to Penn-Central which would normally have gone to them" (386 U.S. at 385).

The public interest questions which were unanswered when this contention was initially made have, however, now received Commission findings. Further, each of the protected railroads has had terms fixed for its inclusion in the N&W system and could have no interest in diverting traffic to Penn-Central.

In seeking to delay the Penn-Central merger, the railroad appellants have, in substance, raised two questions. The first goes to whether the district court properly interpreted the opinion of the Court in the *Baltimore & Ohio case* as to the meaning of "ultimate fate." The second question seeks a determination as to whether a failure on the part of the protected railroads to carry out their "ultimate fate" should nullify the Commission's determinations as to the public interest in consummation of the Penn-Central merger.

The railroad appellants' contentions as to the first question are based upon the statements of the Court that it "is necessary that the decision as to the future of the protected roads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger" (386 U.S. at 390), and that "the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads" (*Id.* at 378). These quotations are the foundation for the contention that the Court intended that the Penn-Central merger should not be consummated until the "permanent home" of the three pro-

tected carriers *has been finally effectuated,* not merely determined (B&O J.S. 11).

The initial issue, therefore, is whether, in its reference to "ultimate fate," the Court intended to forestall consummation of the Penn-Central merger until the Commission had completed its proceedings concerning inclusion of the protected railroads, or whether consummation of the merger should additionally await final judicial review of all such determinations, entry of a final order affirming them, and the requisite corporate action, including a shareholders' vote.

The second question, which is based upon a determination of the first question as sought by the railroad appellants, is whether, "ultimate fate" having been determined, a failure or refusal on the part of a protected road to accept the "ultimate fate" which it had sought would abrogate the right of PRR and NYC to merge, although such failure or refusal is wholly outside the control of Penn-Central.

As to the initial question, the Court stated:

> "We hold only that under the uncontradicted findings of the Commission it was necessary for it to conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger" (386 U.S. at 378).

This holding that "it was necessary for it [the Commission] to conclude the inclusion proceedings . . . " was wholly warranted by the contentions of N&W and C&O-B&O in the oral argument before the Court. It was there contended that one would not know "what

kind of animal Penn-Central is until we know what the conditions are.'" The implication of N&W's position before the Court a year ago was that their concern lay in the possibility, then open, that the protected railroads might eventually be included by the Commission in the Penn-Central system.

In its opinion the district court noted that E-L and D&H stressed to the Court, as they had previously to the district court, that their complaint related to the Commission's failure to finalize the protective conditions. They asked that the merger be stayed until adequate protective conditions had been formulated, not until the N&W inclusion proceedings had been completed (R. 1955-1955A, 1956-1956A). As the district court pointed out:

> "Only the argument of N&W and its allies that it was entitled to know exactly what Penn-Central would or would not include, since competition with a Penn-Central system containing the three roads would be more onerous than if these were in N&W,

[7] R. 1957A. Following such statement by counsel for N&W, there was the following colloquy:

"MR. JUSTICE WHITE: I would take it that approach would require the Commission to find a home for these three carriers prior to approving the merger, because otherwise you would never know what kind of animal you were dealing with, I mean on your own premise.

"MR. TRIENENS: I think that is correct, sir. I think that is correct.

"MR. JUSTICE WHITE: So you really think that Penn-Central merger must be held off until the Commission decides with what system these three are going to join?

"MR. TRIENENS: That is right. They have to find where the place is . . . " (R. 1957A-1958).

would be consistent with the broad reading now urged" (B&O J.S. B-65).

If the Court intended that "ultimate fate" refer to effectuation of inclusion, as distinguished from the Commission's determination of the inclusion issues, it is difficult to see how the Court could have reached the conclusion that "if its [the Commission's] order is attacked in court the hearing there can be expedited, as was this one, and an early determination made" (386 U.S. at 392). The Commission and the district court have amply demonstrated their concern with achieving the utmost expedition in carrying these proceedings to conclusion. Such concern notwithstanding, however, over eight months will have elapsed before the appellees are in a position to ask the Court whether its March 27, 1967 opinion requires that consummation of the merger be stayed only until the Commission has made findings as to inclusion of the three protected roads. If "ultimate fate" means completion of judicial review of each and every aspect of inclusion in the *N&W inclusion case,* as contended by the railroad appellants, there may be no end in sight in the *Penn-Central merger case.*

The answer to the "ultimate fate" contention, according to the district court, "would seem to be that the interests of N&W and those making common cause with it are protected by their right to oppose and challenge any future order including any of the three roads in Penn-Central" (B&O J.S. B-65).

The contentions, moreover, now go beyond merely claiming that the merger must be stayed until entry of a final order in the *N&W inclusion case.* It is now

claimed that a "permanent home" must be secured for the three protected carriers (B&O J.S. 11). This contention encompasses several further questions which are stated to be among the bases for the appeals in the *Penn-Central merger case.* Thus, questions are raised whether the district court properly followed *S.E.C.* v. *Chenery Corp.,* 332 U.S. 194 (1947), whether the Commission properly observed the requirements of Section 8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b)), whether the Commission made all necessary findings under Section 5(2) of the Interstate Commerce Act (49 U.S.C. §5(2)), and whether the Commission made adequate findings concerning the relationship of the Appendix G conditions and a pooling under Section 5(1). All of these questions involve the common hypothesis of a failure of one or more of the protected railroads to carry out its own inclusion in N&W. From this base, a broad variety of hypothetical possibilities may be propounded, such as the duration and effect of Appendix G and business practices under it in the case of a carrier which has the benefits of Appendix G but has chosen not to be included, and the effect of E-L or D&H or B&M failing to carry out the corporate acts necessary for consummation of its own inclusion. As the possible permutations are propounded, the easier it becomes for the railroad appellants to suggest, without foundation, that the Commission has failed to make some vital finding.

However, both the Commission and the district court have met this problem. As early as its September 16, 1966 report (328 I.C.C. 304), the Commission showed its

awareness that railroads seeking inclusion under Section 5(2)(d) of the Interstate Commerce Act might not accept the terms for inclusion fixed by the Commission. It then weighed the consequences of such a failure to accomplish an inclusion of the protected railroads in some system against the benefits which would flow to the public from a Penn-Central merger:

> "We recognize that we cannot at this time guarantee absolutely that E-L, D&H and B&M will be included in a major rail system or terms which they find satisfactory. However, we do not believe that this uncertainty is one which justifies postponement, perhaps for several years, of large public benefits which will flow from applicants' merger." (328 I.C.C. at 312)

Since the Transportation Act of 1940, the Commission has not had the power to initiate and enforce any restructuring of railroads deemed necessary to achieve the objectives of the National Transportation Policy (*Cf. St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954)). Nevertheless, it remains charged with the task of "developing, coordinating and preserving a national transportation system" (National Transportation Policy, 49 U.S.C., preceding §1). This result is only possible through formulation of conditions cut to fit a particular pattern possible of achievement within the framework of voluntary proposals.

These conditions may, as in the instant cases, involve elaborate concepts. Thus, in its June 9, 1967 report in the *N&W inclusion case*, the Commission again made clear that it had fully considered the problems that

could be created from a failure on the part of E-L, D&H or B&M to go through with the inclusion in N&W which they themselves sought. In Appendix F to that report, the Commission provided that, if the stockholders of E-L, D&H or B&M should reject the terms and conditions of inclusion in N&W prescribed for their company, then such company's petition for inclusion in the Penn-Central system would be considered dismissed (330 I.C.C. 780, 868-869). This condition was coupled with other provisions of Appendix F that N&W could acquire control of D&H only if it acquired control of E-L, and could acquire control of B&M only if it acquired control of D&H (*Id.* at 868).

The Commission went on to provide, with specific correlation to condition 9 of Appendix A in the *Penn-Central merger case* (327 I.C.C. 475, *modified,* 328 I.C.C. 304, 322), that if D&H and B&M should not be included in N&W as a consequence of a failure by N&W to acquire control of E-L, the petitions of D&H and B&M in the *N&W inclusion case* would be considered denied (330 I.C.C. at 868). Further, if B&M's inclusion in N&W should be frustrated by reason of a failure on the part of D&H to be included in N&W, the petition of B&M to be included in N&W would be considered as having been denied (*Id.*). The effect of these conditions is to permit a protected railroad, whose inclusion in N&W has been frustrated by the refusal of another of the protected roads to carry out its own inclusion, to proceed with its petition to be included in Penn-Central. But any protected railroad which fails to

carry out its authorized inclusion in N&W cannot thereafter seek inclusion in Penn-Central.

These detailed conditions are further keyed to the Appendix G protective conditions in the *Penn-Central merger case.* Revised Appendix G in the June 9, 1967 report (as modified by a correction list dated June 27, 1967 and an order dated September 8, 1967) provides that the "Protective Period" under Appendix G shall end when the protected railroad has been included either in the N&W system or the Penn-Central system. If such protected railroad does not accomplish its inclusion within one year after being permitted to do so, however, the "Protective Period" shall end when the Commission so orders (330 I.C.C. 328, 362).[8]

Thus, in summary, if the Court affirms the Commission's orders for the inclusion of the protected railroads in N&W, a protected railroad will lose its right to seek inclusion in Penn-Central, and its right to protection under Appendix G is subject to termination upon order of the Commission if the railroad fails to carry through its inclusion within one year following the date of the Court's affirmation order. Under Appendix F in the *N&W inclusion case,* this result would be qualified if a protected railroad is frustrated in its inclusion in N&W by reason of the act of another protected railroad whose inclusion is a condition of the first railroad's inclusion.

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[8] Appendix G provides that the rights to protection are not affected until a "final determination." This is defined to mean an order which finally disposes of a protected railroad's petition for inclusion on a basis which leaves it with no further recourse with respect to such petition (330 I.C.C. at 362).

In this situation, the frustrated railroad would have the right to seek inclusion in Penn-Central, and the railroad causing the frustration would not only lose that right but would have its Appendix G protective conditions subject to termination by the Commission after one year.

Contrariwise, if the Court determines that any protected railroad should not be included in N&W, such protected railroad would have the right for a period of one year thereafter to seek inclusion in Penn-Central, and would have protection under Appendix G until its petition had been finally determined. If the protected railroad fails to petition for inclusion in Penn-Central or, having so petitioned, should fail for one year to avail itself of a right to be included in Penn-Central, the protection of Appendix G may be terminated.

Even if it is assumed that the Commission has not specified every conceivable hypothetical permutation arising in the *N&W inclusion case* from a refusal on the part of a protected railroad to carry out its right to inclusion, or from a judicial reversal of the Commission's findings as to inclusion, or the terms thereof, there can be no reasonable argument that the Commission has failed to consider the consequences of a frustration of inclusion in the case of one or more of the protected railroads, or that it has not retained the necessary jurisdiction to administer the protective conditions of Appendix G in the *Penn-Central merger case* in a manner which would ensure the appropriate balancing

at all times of conflicting claims involving the public interest.[9]

E-L and D&H join with N&W and C&O-B&O in the argument that there has been error on the part of the Commission and the district court in not preserving a right for E-L and D&H to secure "capital loss indemnity" from Penn-Central. They claim that such an indemnity would be necessary in the event that judicial review of the *N&W inclusion case* produces a downward revision of the inclusion terms because of a reversal of the Commission's findings with regard to the traffic consequences of the Penn-Central merger upon the protected railroads as part of the N&W system.

The district court fully considered this contention (B&O J.S. B-16). On the one hand, it doubted that the Court, or the Commission on a remand, would subscribe to the view that "N&W can only be required to pay a sum which takes account of post-Penn-Central-merger losses, or — for that matter — would accept the view of E-L and D&H that the Interstate Commerce Act requires them to be compensated for any decrease in price resulting from such losses." On the other hand, the district court made clear that it considered that PRR and NYC would be subject to any payment of this nature that the Court might direct the Commission to impose if the merger should be consummated before a

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[9] The argument (B&O J.S. 14) that the Commission has left an alternative open to each of the protected roads "to shop with Penn-Central for even more favorable financial terms" is insupportable in the light of the pattern of the protective provisions and conditions.

final disposition by the Court of the *N&W inclusion case.*

Not only are these observations of the district court of great weight in minimizing the significance of the issue of capital loss indemnification, but it appears that the Commission reserved jurisdiction in the *Penn-Central merger case* broad enough to encompass any consideration of the issue which might hereafter prove to be appropriate. It there concluded "that no need is shown for any capital loss indemnification condition herein" and went on to provide:

> "We reserve jurisdiction to reopen these proceedings for the purpose of modifying any or all of the provisions herein set forth in the light of experience" (330 I.C.C. at 362).

It is submitted that all necessary findings have been made by the Commission and that there is no remaining issue raised by the railroad appellants which would warrant further delay in consummation of the Penn-Central merger.[10]

II. THE CONTENTIONS OF NEW HAVEN BONDHOLDER APPELLANTS

The appeals of both Gruss and the Committee would require a postponement of consummation of the Penn-Central merger until such time as the New Haven's inclusion could be concurrently accomplished. In view

[10] Since Reading does not seek a stay in consummation of the merger pending determination of the traffic protective issues which it raises, the New Haven Trustees do not consider it necessary to take any position with regard to the questions raised by Reading.

of the critical cash position of the New Haven, the course these appellants urge would thwart the very result which they seek for the simple reason that the New Haven cannot survive until completion of proceedings for determination of the terms of its inclusion in Penn-Central under both the Bankruptcy Act and the Interstate Commerce Act.

The New Haven's critical financial circumstances and lack of cash do not permit the slightest hope that it could survive an extended period, even if consummation of the Penn-Central merger could, as a practical matter, be postponed. Neither Gruss nor the Committee give any suggestion as to how the operations of the New Haven could be continued during such postponement, no matter how shortened was the period for final determination of inclusion terms.

As pointed out by the district court:

> "Insofar as the complaints seek to enjoin consummation of the merger pending inclusion of the properties of NH by way of sale, they are sufficiently answered by Judge Anderson's order of July 11. In his view any substantial postponement of consummation means speedy death for the New Haven; hope lies rather in early consummation subject to a commitment that will fairly assure continued operation while the administrative and judicial mills continue their painfully slow grind." (B&O J.S. B-28)

By its second supplemental report dated November 16, 1967, the Commission has provided a means whereby an interim *de facto* inclusion of the New Haven can be

accomplished pending the completion of the "painfully slow grind" which remains. At the same time, the Commission has approved, as a first step in the New Haven's reorganization, a prompt conveyance of its assets to Penn-Central upon prescribed terms and conditions, found to be fair and equitable, without waiting for the proceedings necessary to determine the treatment of claimants having an equity in the estate.

Thus, not only has the Commission required Penn-Central to participate in the New Haven's operating losses pending conveyance of the New Haven's assets, but it has provided a means to terminate the entire burden upon the estate of its present operations. At the same time, the appellants, as well as all other interested persons, will have the right to object to, and have judicial review of, these determinations by the Commission.

Gruss and the Committee argue that such judicial review will not be effective. To the extent that it is argued that the New Haven may not survive long enough for judicial review, the contention is met by the interim relief provided in the Commission's November 16 report; the New Haven will be supported during the period pending conveyance of its assets to Penn-Central. Otherwise, unless these appellants desire to attack inclusion itself, the only issues which would remain for judicial review relate solely to the *quantum* of the interim participation by Penn-Central in the New Haven's operating losses or the total consideration to be paid by Penn-Central for the New Haven's assets.

None of these questions of *quantum* of consideration requires postponement in consummating the merger in order to secure full and effective judicial review, so long as the Commission has the power to carry out the mandate of such judicial review. In this regard, the Commission has ordered:

"That as a prerequisite to this Commission's approval of the transactions authorized in 327 I.C.C. 475, The Pennsylvania Railroad Company and The New York Central Railroad Company are authorized and directed to include The New York, New Haven and Hartford Railroad Company, and its affiliates and subsidiaries, including the New England Transportation Company, in their system in the manner and under the terms found equitable and conditions prescribed in the said second supplemental report;

* * *

"That consummation of the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company shall constitute an irrevocable assent of The Pennsylvania New York Central Transportation Company to enter into a loan arrangement with the Trustees of The New York, New Haven and Hartford Railroad Company in accordance with the terms and conditions required in the said second supplemental report;

* * *

"That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior reports and orders of the Commission and to those orders which may be issued under section 5(9) of the Interstate Commerce Act." (App. A-2, 4-5)

As to inclusion itself, the appellants are aware of the lack of alternatives. The district court pointed out:

> "In its order of August 3, 1967 the Commission reiterated its conclusion that contentions 'that there are possible solutions to the NH problem other than inclusion in Penn-Central are without merit,' and at the argument before us Gruss' counsel conceded that the only alternative to inclusion in Penn-Central is liquidation. While the Committee holds out the possibility of condemnation by the four states served by NH, wishful thinking will not meet imminent payrolls." (B&O J.S. B-28)

The district court observed that these appellants no longer seriously seek to postpone consummation of the Penn-Central merger indefinitely, but are attempting to make Penn-Central responsible for all operating losses of the New Haven, whether or not caused by their merger, until the New Haven either itself ceases to operate or is included in the Penn-Central system (B&O J.S. B-28). As the district court pointed out:

> "Penn-Central is understandably unwilling voluntarily to go so far, although under the Commission's order of September 12 the companies by consummating the merger take the risk, subject only to the safeguard of judicial review, that they may be compelled to do just that. *Per contra,* if the Commission's order should prove unsatisfactory to the plaintiffs [the appellants], they too will be entitled to seek review." (B&O J.S. B-28-29)

The Commission's second supplemental report of November 16, 1967 makes it clear that PRR and NYC must accept inclusion of the New Haven upon the terms

set forth in the report if they proceed to consummate their merger. Similarly, they must accept the terms fixed by the Commission for interim relief. In neither instance does it appear that PRR and NYC would have any right to litigate once the merger has been consummated. On the other hand, there is no restriction, express or implied, on the right of these appellants to litigate questions either of the New Haven's "interim inclusion" or the terms for its *de jure* inclusion. The Commission's overall reservation of jurisdiction, we submit, would protect these appellants in any revisions required upon judicial review. Thus, their rights to litigate having been fully preserved, these appellants should not be permitted to thwart preservation of the New Haven's operations.

Among the other contentions made by these appellants is Gruss' argument that the Commission failed to hear his application for "immediate inclusion." Gruss argues, in part, that the New Haven Trustees left the first mortgage bondholders without representation in the Penn-Central merger proceedings and "contracted away" their rights (Gruss J.S. 11-12, 33-34). Essentially the same arguments were made before the district court in the first *Gruss case* (261 F. Supp. 386 (1966)) and were properly considered to be issues for the reorganization court. Subsequently, by way of answer to the New Haven Trustees' petition for order no. 441, Gruss made the same points to the reorganization court and requested that the Trustees be instructed in accordance with its views (Gruss J.S. 33A, 36A). In its Partial Ruling on petition for order no. 441 (R. 2003-

2005), the reorganization court refused so to instruct the New Haven Trustees and stated that "the Trustees have quite properly felt under a duty to continue their support of the agreement thus entered into and avoid any action which would be or appear to be a repudiation of its letter or spirit" (R. 2004).

Gruss complains that in reaching their agreement with PRR and NYC in December, 1964, the New Haven Trustees changed their position as to the time when the New Haven should be included in Penn-Central and that, accordingly, it was necessary for Gruss to file its petition on July 11, 1966 with the Commission for postponement of the merger until the New Haven could be included (Gruss J.S. 32-34). In fact, however, Gruss was fully aware of the agreement reached between the New Haven Trustees and PRR and NYC as early as April, 1965 (Gruss J.S. 32), and advised the Commission in July, 1965 that it had no objection to the examiners' report issued in April, 1965 requiring inclusion of the New Haven's freight service in the Penn-Central system. Its letter was stated to be "for the purpose of making *one minor suggestion* — namely, that the condition . . . be expanded to require the merged Pennsylvania-New York Central to assume responsibility for those operations upon the effective date of the merger, *if prior thereto the parties have not come to an agreement as to terms*" (App. D-2, emphasis added).

Thus, contrary to present contentions, Gruss not only was in a position to have filed its petition seeking immediate inclusion one year earlier than it did, but it

even advised the Commission at such earlier time that it considered the question of immediate inclusion to be a "minor suggestion." Furthermore, even as to that suggestion, Gruss stated that it would be satisfied if, prior to the effective date of the merger, the parties had come to an agreement as to terms. At that time, Gruss was aware that the New Haven Trustees had reached an understanding with PRR and NYC which was reported, to Gruss' knowledge, on April 7, 1965 (Gruss J.S. 32). That understanding "was formalized a year later in the Sale Proposal dated April 21, 1966" (Gruss J.S. 32-33). These contentions of Gruss as to the need for it to act on behalf of the estate, its claims as to the Trustees' failure to represent the estate, and its argument that it was deprived of a hearing, have no support in the record of the proceedings.

A further contention, made by the Committee, is that the Commission's orders are deficient in failing to provide the equivalent of Appendix G protective conditions for the New Haven pending its *de jure* inclusion in Penn-Central.[11]

The district court rejected these contentions on the ground that an indemnification provision, such as con-

[11] As part of this argument it is contended that the Commission has not determined the "ultimate fate" of the New Haven consistent with the Court's opinion in the *Baltimore & Ohio case*. But whatever the Court intended by "ultimate fate," at the time of the *Baltimore & Ohio case* when there had been no findings as to the system in which E-L, D&H and B&M were to be included, there was not only a Commission decision requiring inclusion of New Haven in the Penn-Central system, but also an agreement among the New Haven Trustees, PRR and NYC as to terms of such inclusion.

tained in Appendix G, would have the practical effect in the New Haven's case of simply producing an addition to the purchase price (B&O J.S. B-29-30). In its second supplemental report of November 16, 1967, the Commission again considered the questions of indemnification and traffic protective conditions. It pointed out that the standard traffic protective conditions imposed in its report of April 6, 1966 will apply until the New Haven has been included in Penn-Central (slip opinion, p. 136). The Commission further concluded that the record does not justify the imposition of indemnification provisions, pointing out:

> "The evidence here indicates that the Penn-Central merger will not have any significant adverse effect on the NH for several years. Before any such effect occurs, the NH should be included in Penn-Central. Moreover, we have provided herein interim support for NH by Penn-Central pending consummation of the inclusion. It is not unreasonable to believe that the transfer of the NH assets to Penn-Central ownership will have passed before the NH suffers any important loss of traffic. If any unusual or unforeseen circumstances warrant our reconsideration of this matter, our general reservation or [*sic*] jurisdiction in this case can serve as a means for reexamining our position and further examining price. See *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386, 390 (S.D. N.Y. 1966), aff'd. 386 U.S. 776." (slip opinion, p. 136)

In their jurisdictional statements, both Gruss and the Committee raise questions whether the ultimate terms for the New Haven's inclusion will prove to be fair and equitable. In this regard, contentions are made

that it may not be possible for the Commission to fix terms which would make inclusion "feasible" (Committee J.S. 15) and that there can be no fair alternative to an interim "lease or conveyance" (Gruss J.S. 25). The Commission now having made findings by its second supplemental report dated November 16, 1967 as to fairness and equity of the proposed terms and having established a specific pattern for interim protection and speedy conveyance of the New Haven's assets, the issues raised by Gruss and the Committee in these respects may properly be considered to be confined to the question whether judicial review of such findings would be effective. As already shown, the New Haven Trustees consider that there is no obstacle to review by any interested person of those findings and orders and, in view of the Commission's reservation of jurisdiction, the mandate of any judicial review could be made effective.

It is submitted that neither Gruss nor the Committee raises a substantial question which would warrant a further stay of consummation of the Penn-Central merger.

III. THE CONTENTIONS OF OTHER APPELLANTS[12]

It appears that Scranton and Shapp contend that the Commission's findings approving the Penn-Central merger are not supported by the record. In essence,

[12] Since the remaining appellants, other than Scranton and Shapp, do not seek to stay consummation of the Penn-Central merger pending determination of the issues they have raised, the New Haven Trustees do not consider it necessary to take any position with respect thereto.

they contend consummation of the merger would be contrary to the public interest.

The record before the Commission establishes that over 90 states, cities, towns, boroughs, counties, regulatory commissions, and other public agencies participated in various stages of this proceeding. Except for Scranton, none of these opposes consummation of the Penn-Central merger. Of the 13 states which participated in the Commission proceedings, none opposes consummation of the merger and four have consistently urged that it be consummated without further delay.

As the district court pointed out, questions of the nature raised by these appellants were delegated by Congress to the Commission, which must carry the burden of protecting the public interest. To be sure, the Commission's decisions are, and should be, subject to judicial review. However, the importance of such review does not detract from the weight to be given to the findings of an independent agency charged with the function of making such findings.

Quite apart, however, from the support to be derived from the position of the public bodies appearing in the proceedings, the administrative decision reached by the Commission is wholly sustained by the record and has twice been affirmed by the district court upon full review and consideration.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed, and the stay should be dissolved.

Respectfully submitted,

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Attorney for Appellees,
Richard Joyce Smith and
William J. Kirk, Trustees of
the property of The New York,
New Haven and Hartford
Railroad Company, Debtor

November 27, 1967

SECOND SUPPLEMENTAL ORDER

At a General Session of the
INTERSTATE COMMERCE COMMISSION,
held at its office in Washington, D. C., on the
16th day of November, 1967.

Finance Docket No. 21989

PENNSYLVANIA RAILROAD COMPANY—
MERGER—NEW YORK CENTRAL
RAILROAD COMPANY

Finance Docket No. 21990

PENNSYLVANIA RAILROAD COMPANY
STOCK ISSUANCE

Finance Docket No. 24361

PENNSYLVANIA RAILROAD COMPANY
SECURITIES AND ASSUMPTION
OF OBLIGATIONS

Finance Docket No. 21669

NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY REORGANIZATION

Investigation of the matters and things involved in these proceedings having been made, further hearings having been held, and the Commission on the date hereof having made and filed a second supplemental report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That as a prerequisite to this Commission's approval of the transactions authorized in 327 I.C.C. 475, The Pennsylvania Railroad Company and The New York Central Railroad Company are authorized and directed to include The New York, New Haven and Hartford Railroad Company, and its affiliates and subsidiaries, including the New England Transportation Company, in their system in the manner and under the terms found equitable and conditions prescribed in the said second supplemental report;

It is further ordered, That as part of the terms and conditions of said inclusion the Trustees of The New York, New Haven and Hartford Railroad Company, The Pennsylvania Railroad Company, and The New York Central Railroad Company be, and they are hereby, directed to file with the Commission a loan agreement, an amendment to their agreement dated April 21, 1966, as modified October 4, 1966, and an appropriate form of Trustees' certificate in accordance with the terms and conditions in the aforesaid second supplemental report of the Commission no later than 35 days from the date of service of this order;

It is further ordered, That, subject to the terms and conditions in the aforesaid second supplemental report applicable thereto, The Pennsylvania Railroad Company is authorized to issue to the Trustees of The New York, New Haven and Hartford Railroad Company in connection with acquisition of the assets of that railroad (a) 950,000 shares of its common stock of the par value of $10.00 per share, additional shares as may be made necessary by the purchase price adjustments and anti-

dilution provisions referred to in said report, and (b) $23,000,000 principal amount of 25-year Divisional First Mortgage Bonds, and such larger principal amount of bonds as may result from operation of the purchase price adjustment provisions; and to assume obligation and liability in respect of equipment trust obligations guaranteed by The New York, New Haven and Hartford Railroad Company and described in the application in Finance Docket No. 24361, the bonds and certificates of contingent beneficial interest to be issued pursuant to the Boston and Providence Railroad Corporation plan of reorganization, as described in *Boston & P. R. Corp. Reorganization,* 327 I.C.C. 10, and any other securities hereafter issued, assumed, or guaranteed by the Trustees of The New York, New Haven and Hartford Railroad Company under section 20a of the Interstate Commerce Act prior to acquisition of the properties of The New York, New Haven and Hartford Railroad Company by The Pennsylvania Railroad Company which the latter may be required to assume or guarantee pursuant to the terms of the aforesaid agreement;

It is further ordered, That The Pennsylvania Railroad Company shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 156.6);

It is further ordered, That, except as herein authorized, said stock and bonds shall not be sold, pledged, repledged, or otherwise disposed of by The Pennsyl-

vania Railroad Company unless or until so ordered or approved by this Commission;

It is further ordered, That, if the authorities herein granted are exercised, The Pennsylvania Railroad shall submit for the consideration of this Commission three copies of the journal entries required to record the transactions and confirm in writing to this Commission, immediately after consummating the transactions authorized in Finance Docket No. 21989, the effective date of such consummation;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock or bonds, or dividends thereon, on the part of the United States;

It is further ordered, That the petition of Oscar Gruss & Son filed March 20, 1967, be, and it is hereby, dismissed;

It is further ordered, That the terms for the sale of the assets of the New York, New Haven and Hartford Railroad Company, Debtor, to the Pennsylvania New York Central Transportation Company, originally filed as the first step of the plan of the Trustees of the New York, New Haven and Hartford Railroad Company, Debtor, for reorganization of that carrier, as described in said report, be, and they are hereby, approved;

It is further ordered, That consummation of the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company shall constitute an irrevocable assent of The Pennsylvania New York Central Transportation Company to enter into a

loan arrangement with the Trustees of The New York, New Haven and Hartford Railroad Company in accordance with the terms and conditions required in the said second supplemental report;

It is further ordered, That this order shall take effect and be in force 35 days from and after the date of its service and the inclusion directed is to be accomplished within 90 days from the date transfer of the assets of The New York, New Haven and Hartford Railroad Company to the Pennsylvania New York Central Transportation Company, pursuant to the report herein.

And it is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior reports and orders of the Commission and to those orders which may be issued under section 5(9) of the Interstate Commerce Act.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

ORDER

At a General Session of the
INTERSTATE COMMERCE COMMISSION,
held at its office in Washington, D. C.
on the 16th day of November, 1967.

Finance Docket No. 24756

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY TRUSTEES' CERTIFICATES

Richard Joyce Smith and William J. Kirk, Trustees (applicants) of the property of The New York, New Haven and Hartford Railroad Company (New Haven) having filed on September 25, 1967, an application under section 20a of the Interstate Commerce Act for authority to issue Trustees' certificates in an aggregate principal amount not exceeding $25,000,000 to evidence loans to be made by The Pennsylvania New York Central Transportation Company from time to time within three years from the date of the merger of The New York Central Railroad Company (Central) into The Pennsylvania Railroad Company (Penn) upon applicants' request; and

It appearing, That the purpose of the proposed issue is to finance continued operations of the New Haven pending its inclusion in the Penn-Central system;

It further appearing, That the matter of the loan agreement and the contents of the Trustees' certificates

has been considered by the Commission after oral hearing and that the Commission has made findings and conclusions thereon in its second supplemental report after further hearing in Finance Docket No. 21989, et al., *Pennsylvania Railroad Company — Merger — New York Central Railroad Company,* issued concurrently with the service of this order, which findings and conclusions, to the extent applicable, are incorporated herein; and

It further appearing, and the Commission so finds, That the issue by applicants of their Trustees' certificates in an aggregate principal amount not exceeding $25,000,000, to be dated the date of their issue, to mature December 13, 1971, and to bear the prime interest rate of the Morgan Guaranty Trust Company of New York at the time of issue (a) is for a lawful object within the duly authorized purposes of the applicants, and compatible with the public interest, which is necessary for and consistent with the proper performance by the applicants of service to the public as a common carrier and which will not impair the applicants' ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

It is ordered, That applicants be, and they are hereby, authorized to issue, in evidence of said loan, their Trustees' certificates in an aggregate principal amount not exceeding $25,000,000, to be dated the date of their issue, to mature December 13, 1971, and to bear the prime interest rate of the Morgan Guaranty Trust Company of New York at the time of issue;

It is further ordered, That the applicants shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 156.6);

It is further ordered, That, except as herein authorized, said Trustees' certificates shall not be sold, pledged, repledged, or otherwise disposed of by the applicants unless or until so ordered or approved by this Commission; and

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said Trustees' certificates on the part of the United States.

By the Commission.

H. NEIL GARSON,
Secretary

(SEAL)

APPENDIX C

Supplement to Petition for Order No. 441

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

In the Matter of The New York, New Haven and Hartford Railroad Company, *Debtor.*	No. 30226

SUPPLEMENTAL REPORT OF TRUSTEES ON THE FINANCIAL CONDITION OF THE DEBTOR'S ESTATE

1. On April 5, 1967, the Trustees reported to this Court on the status of the Penn-Central merger proceedings as a result of the Supreme Court's decision in *Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372 (1967). They noted that should substantial delay in consummating the Penn-Central merger result from the further proceedings before the Interstate Commerce Commission, pursuant to the Supreme Court's decision, cash generated from rail service might be insufficient to permit maintenance of the New Haven's operations in the interim preceding its inclusion in Penn-Central. The Trustees described various sources from which further cash might be made available and

prayed for instructions concerning their future course of action.

2. By cross-petition dated April 26, 1967, the First Mortgage 4% Bondholders Committee requested that this Court terminate these proceedings to permit a liquidation of the Debtor by its creditors. Following hearings on May 1 and June 19, 1967, this Court issued its Partial Ruling on Petition for Order No. 441, dated July 11, 1967. Thereafter, the Interstate Commerce Commission instituted proceedings on the question of a lease or other appropriate arrangement by which the merged Penn-Central would be required to provide for continuation of the New Haven's operations during the period commencing with consummation of the Penn-Central merger and ending with the conveyance of the New Haven's assets to Penn-Central pursuant to a reorganization plan of the Debtor. The matter is now under advisement by the Commission.

3. On June 9, 1967, pursuant to the remand of the Supreme Court in *Baltimore & Ohio R. Co.* v. *United States,* the Interstate Commerce Commission entered a Supplemental Report on reconsideration and further hearing in the Penn-Central Merger Case; and a Supplemental Report providing for inclusion of the Erie-Lackawanna Railroad Company, Delaware and Hudson Railroad Company, and Boston & Maine Corporation into the Norfolk & Western Railway System (the N & W Inclusion Action).

4. On October 19, 1967, a statutory three-judge court, convened in the United States District Court for

the Southern District of New York, rendered its decision in several actions brought to enjoin enforcement of the orders of the Interstate Commerce Commission authorizing consummation of the Penn-Central merger and the inclusion of the three railroads referred to in paragraph 3 hereof in the N & W System. (*Erie-Lackawanna Railroad Company* v. *United States,* S.D. N.Y., 66 Civ. 2860, 2903, 2914, 3413, 67 Civ. 2451.) In summary, the decision upheld the orders of the Interstate Commerce Commission, but stayed said orders for fifteen days to permit the filing of any notices of appeal and prosecution thereof before the Supreme Court.

5. By order dated November 9, 1967, the Supreme Court continued the stays in the Penn-Central Merger Case and in the N & W Inclusion Action, consolidated the appeals in said actions, and set oral argument for December 4, 1967. Among the appellants and applicants for stay in the Penn-Central Merger Case are the First Mortgage 4% Bondholders Committee and Oscar Gruss & Son.

6. Pending resolution of the issues now before the Supreme Court and the Interstate Commerce Commission, the New Haven's cash problem continues. The substantial cash attrition which the Trustees reported would occur in 1967 has steadily increased and resulted in a cash loss of $5,174,000 for the first ten months of 1967, after taking into account the receipt of $1,008,000 as free cash from the Boston Terminal Corporation pursuant to Order No. 468 herein. Barring unforeseen

contingencies beyond their control, the Trustees anticipate that there will be sufficient cash to support operations until December 31, 1967, when it is estimated that the working cash balance will be approximately $2,000,000. This estimate assumes that the Trustees will receive $500,000 before year-end from Providence Produce Warehouse Company pursuant to Order No. 478 herein, but does not include any possible additional financial assistance from public authorities referred to below.

7. Under present forecasts and absent the availability of additional funds, the working cash balance in the early part of January, 1968 will be inadequate to discharge operating expenses and to maintain current operations.

8. The Trustees have made these facts known to public authorities and are exploring with them methods of providing interim financial assistance by grant, loan, or other appropriate means. Negotiations with the United States Department of Transportation have resulted in a proposed agreement under which the estate would be reimbursed for expenditures made to upgrade the right of way between Boston and New York for the conduct of experimental high-speed passenger service under a federal demonstration project. If this Court approves this proposal, federal funds of approximately $500,000 should become available toward the end of December, 1967. Other substantial sources of cash must be found, however, to prevent disruption of service. While the Trustees are conducting negotia-

tions to this end, precise recommendations cannot be formulated until the status of pending proceedings before the Supreme Court and the Interstate Commerce Commission permits a clearer assessment of the future of the Debtor's reorganization. The purpose of this report is to make it clear that at this juncture cash is not available to insure train service beyond early January.

Dated: November 14, 1967.

Respectfully submitted,

RICHARD JOYCE SMITH and
WILLIAM J. KIRK,
Trustees of the property of The New York, New Haven and Hartford Railroad Company,

By

JAMES WM. MOORE
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Counsellor at Law
164 Lincoln Road
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201 – 233-6811

July 9, 1965

Interstate Commerce Commission
Washington, D.C.

Re: *Finance Docket No. 21989–90*

Gentlemen:

Oscar Gruss & Son, holders of $10,556,000.00 Principal amount of New York, New Haven & Hartford Railroad Company, First and Refunding Mortgage 4% Bonds, have intervened in the proceeding before this Commission for the reorganization of that Railroad, Finance Docket No. 21669. As such holders of New York, New Haven & Hartford Railroad Company Bonds, Oscar Gruss & Son are vitally interested in the conditions relating to that Railroad to be included in any order of this Commission authorizing merger of the Pennsylvania and New York Centrol Railroads.

The recommendation in the Examiners' Proposed Report for the merged Pennsylvania – New York Central to acquire the New Haven's freight operations upon terms to be fixed by this Commission if the parties are unable to agree (F.D. 21989-90) is entirely fair and reasonable. Oscar Gruss & Son having no objection thereto, have not sought to intervene in this proceeding which has so many ramifications relating to the broad public interest.

However, Oscar Gruss & Son respectfully request that this letter be made a part of the Record in Finance Docket No. 21989-90 for the purpose of making one minor suggestion — namely, that the condition relating to acquisition of the New Haven's freight operations be expanded to require the merged Pennsylvania-New York Central to assume responsibility for those operations upon the effective date of the merger, if prior thereto the parties have not come to an agreement as to terms.

Such a provision would be consistent with the Examiner's proper concern that New Haven interests should not be placed in a position to delay indefinitely the Pennsylvania – New York Central merger.

At the same time it would prevent the Pennsylvania-New York Central resorting to delaying tactics which would permit New Haven's operating losses to consume all its valuable assets before the transfer of its freight operations can be consummated.

This, we believe, is fair to all parties concerned.

Respectfully submitted,

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FILED
NOV 24 1967
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 778, 779, , ,

BALTIMORE & OHIO RAILROAD CO., ET AL.
Appellants,

v.

UNITED STATES, ET AL.,
Appellees,

AND CONSOLIDATED PROCEEDINGS.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM

Submitted by
STATE OF CONNECTICUT

COMMONWEALTH OF MASSACHUSETTS

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

State of Connecticut
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AND CONSOLIDATED PROCEEDINGS.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM

The State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations, respectfully request the Supreme Court to affirm the Order of the Court below. We request the Supreme Court to require no further stay of the Interstate Commerce Commission Order which authorizes consummation of the merger of the Pennsylvania and New York Central Railroads.

In support of this motion, which is filed pursuant to Paragraph 1(c) and 1(d) of Rule 16 of the Rules of this Court, we submit the following.

I. THE NEW HAVEN RAILROAD AND ECONOMY OF NORTHEAST UNITED STATES.

In 1966, the New Haven Railroad carried 20 million tons of freight within its service area, which includes every major

city in Connecticut, in Rhode Island, in Southern and Eastern Massachusetts, as well as New York City and vicinity. This is the only railroad that provides both passenger and freight service within Connecticut, Rhode Island and major portions of Massachusetts, and between New York City and Southern New England.

The New Haven Railroad service area includes major defense industries which furnish substantial proportions of the nation's airplane and helicopter engine production and related components; nuclear submarines; rifles and other weapons (including the only producer of the M-16 Rifle, which is the prime weapon used by American soldiers in the Vietnam conflict); electronic and computer manufacturers; Department of Defense stockpiles of strategic materials; and a large number of related industries that serve the major defense material producers located in this strategic area of the nation.

New Haven's freight business produced revenues of 66 million dollars in 1966. Even temporary cessation of this indispensable service would have an immediate and incalculable adverse effect on the nation's defense effort and a catastrophic effect on the economy of our area.

In 1966, the New Haven carried 24 million passengers, including thousands of daily commuters who are completely dependent upon New Haven service for transportation to and from the metropolitan centers of New York City and Boston. Even temporary cessation of this indispensable service would leave these commuters with no practical alternate means of transportation. Highways in these areas are already overtaxed during peak commuting hours, and the addition of more vehicles during these periods of the day, whether buses or private automobiles, would result in massive traffic jams, as occurred during the two-week New York City subway strike of January, 1966. Even if highways could accommodate additional vehicles, neither the New York nor the Boston metro-

politan areas have the capacity for parking these additional vehicles.

In 1966, New Haven passenger business produced almost 38 million dollars in revenues, plus 6 million dollars in cash support furnished by the states served by this bankrupt railroad. Despite this state assistance, in 1966, the New Haven Railroad sustained a deficit of $11,345,000, and despite continuing 1967 state assistance, this Railroad's deficit for the first nine months of 1967 has already reached $17,190,000.

But even more urgent than this ever increasing deficit is the cash position of this railroad. While the deficit is computed after taking into account many expenses that do not require immediate cash outlay, such as depreciation and deferred interest obligations, no enterprise can continue operations without sufficient cash to meet its payrolls and other non-deferrable expenses.

New Haven Railroad operations are now within thirty days of complete shutdown due to the continuing attrition of available cash resources. The N.H. Trustees anticipate that in January 1968 they will have insufficient cash to meet their 1.5 million dollar weekly payroll requirement.

As pointed out by the Court below, no party disputes the conclusion that:

> "* * * early consummation of the merger not only will benefit the New Haven but is necessary to its survival. * * * that road's condition has become far graver than when this case was last before us or the Supreme Court." (Page B-15, Appendix B, Jurisdictional Statement of Baltimore & Ohio Railroad, Et al.)

The Court below stated further on Page B-29:

"What is urgent to avoid cessation of NH's vital service

are (1) early consummation of the Penn-Central merger and (2) a Commission order prescribing some form of financial aid that will permit the NH's operations to continue beyond December 31, 1967, when, as the NH Trustees now advise, their cash available for operations will be exhausted. The Commission has given every indication of its intention to do precisely that."

On Page B-70, the Court summarizes the New Haven crisis as follows:

"No one has contested the forecast of the NH Trustees that their cash will run out at the end of 1967; no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central. * * * For our part we are unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed * * *."

The State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations, point out to the Supreme Court that the earliest possible consummation of the Penn-Central merger is urgently required by the public interest because this merger is the only practical method available to preserve essential New Haven Railroad services.

II. NEW HAVEN RAILROAD AND PENN-CENTRAL MERGER.

Other parties argue that the New Haven Railroad crisis should not be the sole basis for authorizing consummation of the Penn-Central merger, and the States and the Federal Government should have taken necessary steps to preserve

the essential New Haven services. The fact remains that the Federal Government has not acted, and the States do not have the constitutional power to take over an interstate service.

We do not contend that the urgent New Haven Railroad crisis should be the only basis for favorable action by this Court in authorizing immediate consummation of the Penn-Central merger.

In the *Baltimore & Ohio Railroad Co. et al., v. United States, et al.* decision 386 U.S. 372 (1967), the Supreme Court reversed and remanded to the Interstate Commerce Commission for appropriate action, the Commission order authorizing the Penn-Central merger. We submit that the Commission has corrected all deficiencies which were the basis for this remand, as outlined in detail in the decision of the Court below.

But now that we are before the Supreme Court for the second time within a period of less than one year, and now that we stand at the brink of total collapse of an essential public transportation system, we emphasize that immediate consummation of the Penn-Central merger and implementation of the Interstate Commerce Commission directive to the merged company to support the New Haven, is the only feasible method of preserving this indispensable public transportation system.

III. CONSOLIDATION OF PENN-CENTRAL MERGER AND NORFOLK AND WESTERN INCLUSION CASE.

Although the Supreme Court is hearing these interrelated matters on a consolidated record, we ask the Court not to delay its decision in the Penn-Central merger case while considering the Norfolk and Western inclusion case. For reasons outlined herein, even a short delay in authorizing consummation of the Penn-Central merger will have a disastrous effect upon both the nation's defense program and the economy of Eastern United States.

Thus, while we take no position on the inclusion case and we limit our participation in these consolidated proceedings to seek expeditous approval of the Penn-Central merger, we submit that it would be in the public interest for the Supreme Court to issue separate decisions, if necessary, in order to avoid the disastrous adverse effect of further delays in the Penn-Central merger.

IV. INTERSTATE COMMERCE COMMISSION INTERIM LEASE OR SUPPORT PLAN.

In recognition of the unprecedented nature of the New Haven Railroad crisis, the Interstate Commerce Commission has undertaken the extraordinary procedure of holding proceedings on an interim support or leasing plan, under which the Penn-Central merged company would undertake the responsibility for continuing New Haven service immediately upon consummation of their merger. As set forth in Interstate Commerce Commission directives, consummation of the merger would constitute irrevocable consent by the merging companies to the interim support or lease plan promulgated by the Commission.

The State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and the Providence Plantations, are confident that the support or leasing order of the Commission will insure the continuation of the essential public transportation services operated by the New Haven Railroad, and for this reason, we submit that any further delay in the Penn-Central merger, as requested by New Haven Railroad bondholders, *inter alia*, would be wholly adverse to the vital interests of our States and of the United States.

V. FEDERAL TRANSPORTATION POLICY.

As pointed out by Justice Fortas in his dissenting opinion in *Baltimore and Ohio Railroad Co., et al., v. United States* (18 L. ed 2nd, 159 at 211):

"For more than 45 years it has been the national policy, reflected in congressional legislation, that the railroads of this country should be combined into a limited number of systems."

While the Federal policy with respect to consolidating our national railroad system for the purpose of eliminating unwarranted and uneconomical duplication of rail services, has been clearly set forth, we are lacking a Federal policy and a Federal program to cope with problems of financially distressed interstate railroads that provide indispensable public service. Thus, we are compelled to rely on this long delayed Penn-Central merger as the only practical method of dealing with this unprecedented and extremely urgent interstate transportation crisis.

The issue before this Court is the survival of the New Haven Railroad and the survival of our national rail system as a free enterprise industry.

As Justice Fortas emphasized at 18 L. ed 2nd, 159 at 218, delay in implementing Interstate Commerce Commission orders authorizing railroad mergers means that:

"* * * national policy continues unfulfilled; urgent national needs for improved long-haul and local rail service are impeded; the desperate erosion of the New Haven continues at a rapid pace; and the public and communities urgently in need of improved rail service continue to suffer."

VI. CONCLUSION

The State of Connecticut, the Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations, respectfully submit that the questions presented by the appellants in this proceeding are unsubstantial and warrant

no further stay of enforcement of the order of the Interstate Commerce Commission.

We submit that the urgent public interest in preserving indispensable rail services requires affirmation of the judgment of the District Court.

We ask the Supreme Court to deny all requests for further delay of the Interstate Commerce Commission order which authorizes consummation of the merger of the Pennsylvania and New York Central Railroads.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 778 and 779

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF STATE OF NEW JERSEY TO AFFIRM JUDGMENT UPHOLDING I.C.C. INCLUSION ORDER

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IN THE

Supreme Court of the United States

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BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

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vs.

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NORFOLK AND WESTERN RAILWAY COMPANY,

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vs.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

MOTION OF STATE OF NEW JERSEY TO AFFIRM JUDGMENT UPHOLDING I.C.C. INCLUSION ORDER

Motion to Affirm

Appellee New Jersey, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to affirm the judgment of the statutory three-judge court in the Southern District of New York insofar as it upholds the

order of the Interstate Commerce Commission (I.C.C.) approving the application of Erie-Lackawanna for inclusion in the Norfolk & Western system.*

Opinion Below

The opinion of the statutory three-judge court in the Southern District of New York has not yet been reported but is attached to Norfolk & Western's jurisdictional statement as Appendix B. The Interstate Commerce Commission's Order of June 9, 1967 requiring inclusion of Erie-Lackawanna in the Norfolk & Western system is reported at 330 I.C.C. 328 (1967).

Interest of New Jersey

The State of New Jersey enacted legislation in 1967 which permits long term contracts between the state and railroads to provide for vital railroad passenger service. Laws of 1967, Chapter 71, N.J.S.A. 27:1A-5 (Appendix A). Erie Lackawanna is a major rail carrier of passengers in New Jersey and it is in New Jersey's interest to continue Erie-Lackawanna as a viable railroad.

Statement

The State of New Jersey is served by the Erie-Lackawanna Railroad. It has approximately 335 miles of railroad in New Jersey. It carries approximately 35,000 passengers daily, most of them commuters to Newark and New York primarily from Bergen, Passaic, Essex, Union and Morris Counties. *In the Matter of the Petition of Erie-Lackawanna for Permission to Discontinue Its Passenger Service in New Jersey,* N. J. P. U. C. Docket 661-8, 63 P.U.R. 3rd 607 (1966).

---

* The I.C.C. also approved the inclusion of Delaware & Hudson and Boston & Maine in the Norfolk & Western system.

The State of New Jersey has embarked upon an ambitious program of rehabilitation of its passenger carrying railroads. The state legislature expressed its concern over rail passenger service in New Jersey when it enacted the Laws of 1964, Chapter 88.* This legislation committed the

---

* The Legislature hereby finds and determines that:

(a) Commuter and suburban rail passenger and ferry service between points within this State and between points in this State and in adjacent metropolitan areas in other States as now operated results in a financial loss to each of the respective railroad and ferry carriers;

(b) Continuation of these losses will lead to attempts to discontinue vital commuter and suburban rail passenger and ferry service, as well as to increase the passenger fares applicable to such service;

(c) Substantial curtailment of present commuter and suburban rail passenger and ferry service will increase highway congestion which will require the expenditure of many millions of dollars by the State and its counties and municipalities and other agencies for the construction of additional roads, bridges and tunnels;

(d) Substantial curtailment of present commuter and suburban rail passenger and ferry service will adversely affect economic values in large portions of the State to the detriment of the people of the entire State;

(e) It is essential to the public health, safety and welfare and to development of the industrial potential of the State that commuter and suburban rail passenger and ferry service be preserved, and improved, if possible, at least until it is determined whether more efficient and desirable alternative means of transportation can be economically provided;

(f) The facilities of railroads and ferries providing necessary commuter and suburban rail passenger and ferry service are an essential part of the State's public transportation system, and it is in the public interest under all conditions now foreseeable that they be preserved and improved and that to this end contracts be made between the

(Footnote continued on following page.)

state to contract with the passenger carrying railroads for preservation of essential passenger service.

In order to carry out its program to rehabilitate and improve railroad passenger service there must be a financially sound railroad to provide the service. The Interstate Commerce Commission has determined that Erie-Lackawanna Railroad is unable to survive as an independent carrier in the face of an impending Penn-Central merger. *Pennsylvania Railroad Co. Merger New York Central Railroad Co.*, 327 I.C.C. 475, at 529 (1966).

New Jersey seeks affirmance of the I.C.C. order requiring inclusion of Erie-Lacakawanna in the Norfolk & Western system to enable New Jersey to continue in its program aimed at improvement of the rail passenger service as dictated by the requirements of public convenience and necessity for the people of New Jersey.

ARGUMENT

The State of New Jersey participated in the proceedings before the Interstate Commerce Commission (I.C.C.) in support of Erie-Lackawanna (E-L) Railroad Company's inclusion in the Norfolk and Western Railway Company (N&W) system.

(Footnote continued from preceding page.)

State and the railroads and ferry companies operating such facilities providing for necessary commuter and suburban rail passenger and ferry service by the railroads and ferry companies in return fo payment to each contracting railroad and ferry company by the State, out of such appropriation or appropriations as may be made by the Legislature, or from such other funds which may be made available from time to time, of amounts not exceeding the value to the State of the consideration received or to be received by the State and the service to the public so rendered by such railroad or ferry company. L. 1964, c. 88, §1.

When the I.C.C. approved the merger of the New York, Chicago and St. Louis Railroad Company (Nickel Plate) the Wabash Railroad Company (Wabash), with the N.&W. and others it imposed a condition as follows:

> "1. For a period of 5 years following the date of the order herein the Commission will retain jurisdiction to permit the filing of petitions by the Erie-Lackawanna Railroad Company, The Delaware and Hudson Railroad Corporation, and the Boston and Maine Railroad for inclusion in the Norfolk & Western system. Upon the filing of such petition or petitions, the attendant facts and circumstances will be appraised upon the basis of an appropriate record or records then to be compiled, and if the affiliation or affiiliations then sought, or some reasonable modification thereof, be found consistent with the public interest, the Commission will direct the accomplishment thereof under such terms as may be found equitable to all parties involved. It is not intended that acceptance of this condition by applicants herein will foreclose or limit review of any decision of the Commission disposing of a petition filed pursuant to this condition.
>
> 2. • • •
>
> 3. Consummation by the applicants of any transaction approved herein shall constitute on the part of such applicants acquiescence in and irrevocable assent to the conditions stated in this appendix."

Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railway Co. Merger, 324 I.C.C. 1 (1964) at p. 148.

There is no question respecting the authority of the I.C.C. to impose such conditions. See 49 U.S.C. 5(2)(d).* *New Orleans & New Orleans Railway Co.* v. *Bozeman*, 312 F. 2d 264 (1963); *Alabama Highway Express Inc.* v. *U. S.*, 241 F. Supp. 290 (1965) aff'd. 382 U. S. 106 (1965); *Walker* v. *U. S.*, 208 F. Supp. 388 (1962) aff'd. 372 U. S. 526 (1963).

N&W now seeks to impose an additional condition before it takes Erie-Lackawanna, Delaware and Hudson and Boston and Maine into its family, and that is an approval of a merger between N&W and B&O-C&O, with the Reading and Central Railroad of New Jersey (C.N.J.) included in a subsidiary made up of E-L, D&H and B&M.

The I.C.C. wisely refused to defer a determination in the E-L inclusion case until after a decision was made in the N&W-C&O plan. This would only prolong the delay and put E-L in further jeopardy should Penn-Central be consummated.

Specifically, N&W urged in the court below that New Jersey has not firmly committed itself to continue the assistance payments. The court below succinctly summarized the the estimated increase in earnings E-L would enjoy as a result of New Jersey's action.

	In Millions
"1. Exemption of passenger service facilities from property taxation	$0.7

* (d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inculsion, and upon a finding that such inclusion is consistent with the public interest.

2. Discontinuances already authorized by N. J. Board of Public Utility Commissioners	2.0
3. N. J. property tax reduction	1.3
4. Assistance payments	3.5
	$7.5"

J.S. B-41.

It then properly held that the I.C.C. could not be expected to furnish a concrete guarantee of what the State Legislature would do in the indefinite future.

New Jersey is ready to do its part to comply with the mandate of the I.C.C. in *New York, New Haven & Hartford Railroad Co., Trustees Discontinuance of all Interstate Passenger Trains,* 327 I.C.C. 151 (1966) at p. 222.

> "In matching the reasonable effort of the railroads to sustain and improve essential passenger services, the public through its governmental representatives must be willing to provide a reasonable level of support for those services. As we have said, this should not be interpreted as requiring a willingness by the public to 'pay the bill' as tendered by the carrier or carriers providing such services at a deficit. Yet, it must imply something more than a mere willingness to provide only that financial assistance which is necessary to sustain such services, and possibly the financial condition of the carrier offering them, at a point just short of collapse.
>
> We believe that the reasonable level of public support should in fact be construed as that level of financial or other public assistance which will stimulate the carrier to initiate or, if already initiated, con-

tinue its own reasonable effort to sustain and improve essential and economically viable passenger services. This, we think, is the kind of creative cooperation which will most productively revitalize and invigorate the operation of America's privately-owned rail passenger operations.

Such public support should not, of course, be limited solely to the contribution of direct or indirect financial assistance to railroads. Beyond this, it must encompass joint governmental-carrier programs to determine, on the basis of current and projected demand patterns, what rail passenger services actually are essential to the public, and at what level they should be maintained or modified. As we already have discussed within the context of this case, such determinations will in turn enable the rational restructuring of rail passenger services and underlying facilities; the rational investment of capital, research and technological skills in the future of such essential operations, and the rational reformation of rate and service concepts no longer responsive to public demand or productive of acceptable levels of patronage and revenue."

N&W's solicitous concern for Reading and C.N.J. before the I.C.C. should more appropriately be the concern of its marriage partner the C&O-B&O system. The I.C.C. found that C&O-B&O either controlled Reading or had the power to control Reading which in turn controls C.N.J. now in the process of reorganization. *Western Maryland Control by C&O-B&O,* 328 I.C.C. 684 (1967). C&O-B&O are certainly in a position to rehabilitate these railroads rather than impose them upon the I.C.C. as part of a package intended to make proposed merger of the N&W and the C&O-B&O more palatable.

CONCLUSION

For the foregoing reasons, the judgment of the District Court insofar as it affirms the I.C.C. Order requiring N.&W. to take in the Erie-Lackawanna should be affirmed.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX A

Chapter 71—Laws of 1967 (New Jersey)

TITLE

AN ACT to amend "An act establishing and concerning a Department of Transportation as a principal department in the Executive Branch of the State Government, establishing therein a Commuter Operating Agency, providing an appropriation therefor, repealing chapter 88 of the laws of 1964, and supplementing Title 27 of the Revised Statutes," approved December 12, 1966 (P.L. 1966, c. 301).

27:1A-5. *Functions, powers and duties of commissioner.* The commissioner, as head of the department, shall have all of the functions, powers and duties heretofore vested in the state highway commissioner and shall, in addition to the functions, powers and duties invested in him by this act [chapter] or by any other law:

(a) Develop, from time to time revise and maintain a comprehensive master plan for transportation development;

(b) Develop and promote programs to foster efficient and economical public transportation services in the state;

(c) Prepare plans for the preservation and improvement of the commuter railroad system;

(d) Develop plans for more efficient public transportation service by motor bus operators; develop statistics, analyses, and other data of use to bus operators in the pro-

vision of public transportation service; facilitate more effective co-ordination between bus service and other forms of public transportation, particularly the commuter railroads, review petitions for motor bus franchises in areas served by the commuter railroad system and make appropriate recommendations on such petitions;

(e) Co-ordinate with transportations activities of the department with those of other public agencies and authorities;

(f) Co-operate with interstate commissions and authorities, state departments, councils, commissions and other state agencies, with appropriate federal agencies, and with interested private individuals and organizations in the co-ordination of plans and policies for the development of air commerce and air facilities; and

(g) Make an annual report to the governor and the legislature of the department's operations, and render such other reports as the governor shall from time to time request or as may be required by law.

SOURCE. I. 1967, c. 71, § 1. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §5, approved Dec. 12, 1966.

27:1A-15. *Definitions.* Hereinafter in this act [chapter], unless the context indicates another or different meaning or intent:

(a) "Carrier" shall mean any individual, copartnership, association, corporation, joint stock company, receiver or trustee operating any railroad or motor bus in this state or between points in this state and between points in other states, for public use;

(b) "Agency" shall mean the commuter operating agency;

(c) "Passenger service" shall mean the operation of railroad trains to carry commuter and other passengers in this state or between points in this state and between points in other states, or the operation of motor buses to transport passengers in this state or between points in this state and points in adjacent states;

(d) "Improvements to capital facilities" shall mean in connection with passenger service the acquisition, construction, reconstruction, relocation, removal, establishment or rehabilitation of passenger stations and terminals, automobile parking facilities, track connections, signal systems, power systems, roadbeds, equipment storage and servicing facilities, bridges, grade crossings, railroad passenger cars, locomotives and motor buses, wherever such improvements are included in determinations filed as required by section 17 of this act.

SOURCE. L. 1967, c. 71, §2. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §15, approved Dec. 12, 1966.

27:1A-16. *Commuter operating agency; members; employees; exercise of powers and duties; minutes, veto by governor.* (a) There is hereby established in the department of transportation the commuter operating agency which for civil service purposes shall be considered to be a board.

(b) The agency shall consist of 4 members who shall be the commissioner of transportation, the assistant commissioner for public transportation, the state treasurer and the

president of the board of public utility commissioners, or their respective designees.

(c) The commissioner and the assistant commissioner for public transportation shall be the chairman and secretary, respectively, of the agency. The executive director of the agency shall be an officer of the department so designated by the commissioner in writing, which designation shall be filed with the secretary of state. Such designation shall continue in effect until the commissioner shall, in the manner herein provided, designate another officer in the department as such executive director. The executive director shall have such powers and duties as are delegated to him by the agency from time to time.

(d) The commissioner shall assign to the agency such employees of the department as may be necessary for the efficient operation of the work of the agency. The agency may also appoint, retain and employ, to serve at its pleasure, a director of operations and a deputy director of operations, and it shall determine their qualifications, duties, services and compensation.

(e) The powers of the agency shall be vested in the members thereof and 3 members of the agency or their designees shall constitute a quorum at any meeting thereof. Action may be taken and motions and resolutions adopted by the agency at any meeting thereof by the affirmative vote of at least 3 members or their designees. No vacancy in the membership of the agency shall impair the right of a quorum to exercise all the rights and perform all the duties of the agency.

(f) A true copy of the minutes of every meeting of the agency shall be forthwith by and under the certification of

the secretary thereof, to the governor. No action taken at such meeting by the agency shall have force or effect until 10 days after such copy of the minutes shall have been so delivered. If, in said 10-day period, the governor returns such copy of the minutes with veto of any action taken by the agency or any member thereof at such meeting, such action shall be null and of no effect.

SOURCE. L. 1967, c. 71, §3. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §16, approved Dec. 12, 1966.

27:1A-18. *Contracts with rail carriers; hearings.* In order to conserve and improve passenger service necessary for public use now and in future years in this state, but subject to the limitations of this act [chapter], the state of New Jersey, acting by and through the agency, may enter into contracts with any rail carrier, providing for acceptance by such carrier of all or any part of the agency's determination. Prior to entering into any such contract, the agency shall hold public hearings where it shall make known the terms and conditions of the proposed contract to interested parties and the general public. Every contract entered into pursuant to this section shall be subject to the following terms and conditions:

(a) Contracts involving expenditure of public funds for improvements to capital facilities shall require continuance of specified passenger service by the carrier for stated periods not limited to a fiscal year, and shall further require that title to such improvements shall be vested with the state, except that where public funds are expended to repair or rehabilitate existing facilities, such title to or other interest in such improvements as the carrier may

have shall be the subject of negotiation between the agency and the carrier.

(b) No such contract shall provide for payments by the state for service rendered with respect to such fiscal year in excess of the loss from passenger service during the previous calendar year as shown in the determination for that fiscal year. If during any contract period a carrier shall realize a profit from the passenger service contracted for, which profit exceeds a return on investment of 6%, ½ of the excess shall be paid to the agency. The accounting procedures to be employed to determine the extent of any profit or loss, as the case may be, shall be a subject of negotiation between the parties to the contract.

(c) Every such contract shall describe the passenger service which the carrier shall be required to operate. Such description shall set forth the operation of the contracted service which shall include timetables, train consists and fair tariffs applicable to the service and any other provisions that the agency may deem reasonable.

SOURCE. L. 1967, c. 71, §4. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §18, approved Dec. 12, 1966.

27:1A-19. *Contracts with motor bus carriers.* The agency may enter into contracts with any motor bus carrier to operate passenger service which the agency shall determine (a) to be necessary to provide or encourage adequate commuter or intercity bus service and (b) would not otherwise be provided or made available without state assistance. Payment by the agency for such passenger service shall be based on the actual cost of such service to the motor bus carrier plus a 6% return on investment.

Appendix A

The agency may also enter into contracts with any motor bus carrier pursuant to which the agency may acquire, purchase or rehabilitate motor buses for lease to such carrier to be operated in specified passenger service, provided that any state funds expended for such programs are at least matched by federal funds.

SOURCE. L. 1967, c. 71, §5. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §19, approved Dec. 12, 1966.

27:1A-22. *Terms of contracts.* Each contract shall contain conditions, terms and provisions as the agency may require including, but not limited to, provisions permitting or relating to (a) determination of contracted service satisfactorily operated, (b) deductions or penalties with respect to unsatisfactory service, (c) auditing and settlement of payments, (d) termination, waivers, release, modification or other effect in event of nonperformances, or of strikes, riots, disasters, acts of God or condition not caused or permitted by the carrier or within its control, (e) additional obligations of the carrier, and (f) any such other matters as the agency deems to be in the public interest. Any such contract may also provide for the rendering of additional service by the carrier, on an experimental basis or for an experimental period or otherwise, and for the payment by the state of additional compensation not exceeding the estimated actual cost of such additional service to the carrier, which additional compensation shall not be limited by the provisions of the first sentence of section 18(b).

SOURCE. L. 1967, c. 71, §6. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §22, approved Dec. 12, 1966.

27:1A-24. *Petition for changes; public hearing; jurisdiction of board of public utility commissioners.* Every carrier entering into a contract shall be obligated to continue during the term of the contract all existing passenger service and fares applicable thereto, except that the contract shall afford the carrier the right to petition the agency for changes in passenger service and applicable fares during the term of the contract. If such a petition includes an application to decrease the number of trains, a substantial change in schedules or an increase in fares, the agency, prior to making any determination with respect thereto, shall hold a public hearing on notice. In acting on any such petition the agency shall give due consideration to the following factors:

(a) The availability of alternative means of public transportation.

(b) The potential cost of continuing the service sought to be curtailed or discontinued.

(c) The cost to the state of providing alternative transportation facilities either by common carriers or highway improvement.

(d) The resulting effect on state and local population trends, economic values and tax revenues.

The authority hereby given the agency with respect to the discontinuance, curtailment, abandonment or change in passenger service shall be exercised during the contract period without regard or reference to the jurisdiction vested in the board of public utility commissioners by section 48:2-24 of the Revised Statutes. At the conclusion of the

contract period the board of public utility commissioners shall resume such jurisdiction but no carrier shall be required to restore any service discontinued as aforesaid unless the board of public utility commissioners shall determine, after notice and hearing, that the service is required by public convenience and necessity.

Notwithstanding any other provisions of this act [chapter], all vehicles used by any motor bus carrier pursuant to contracts authorized by this section shall be subject to the jurisdiction of the board of public utility commissioners with respect to insurance, maintenance, specifications and safety to the same extent such jurisdiction is conferred upon the board by Title 48, Public Utilities, as amended and supplemented.

SOURCE. L. 1967, c. 71, §7. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §24, approved Dec. 12, 1966.

27:1A-29. *Commuter advisory committee; members.* There is hereby established in the departmentment of transportation a commuter advisory committee. Such committee shall consist of the assistant commissioner for public transportation as chairman, and 10 other members appointed by the governor as follows: 2 citizens of the state who are commuters; 2 mayors of municipalities or members of boards of chosen freeholders of counties served by railroads under contract to the state; 2 officials of unions representing employees of railroads under contract to the state; 2 officials of railroads or motorbus carriers under contract to the state; and 2 public members who shall be citizens of the state.

SOURCE. L. 1967, c. 71, §8. Approved May 25, 1967, effective immediately.

NOTE. This section was enacted by L. 1966, c. 301, §29, approved Dec. 12, 1966.

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Nos. 778, 832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ERIE-LACKAWANNA RAILROAD COMPANY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

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November 27, 1967

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Appellees The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) respectfully submit that the final judgment of the District Court dismissing the complaints of appellants The Baltimore and Ohio Railroad Company (B&O), The Chesapeake and Ohio Railway Company (C&O), Norfolk and Western Railway Company (N&W), Western Maryland Railway Company (Western Maryland), Erie-Lackawanna Railroad Company (E-L) and The Delaware & Hudson Railroad Corporation (D&H) was correct and should be summarily affirmed.

STATEMENT

When this case was last before this Court, the Interstate Commerce Commission had not yet completed formulation of protective conditions to guard the traffic and revenues of E-L, D&H and Boston & Maine Corporation (B&M) following the Penn-Central merger and prior to the inclusion of those roads in a larger railroad system. At that time there were also pending undecided before the Commission applications of E-L, D&H and B&M for inclusion in the N&W system.

The Commission has since concluded the inclusion proceedings by determining that E-L, D&H and B&M have the right to be included in the N&W system on specified terms. (330 I. C. C. 780) The Commission has also formulated final protective conditions (330 I. C. C. 328), which have been accepted without challenge by the three carriers for whose protection they were designed, and has found that the public interest "requires" that the merger go forward "at the earliest possible date" (*id.* at p. 361). Its order in the Inclusion case has been unanimously affirmed by a statutory three-judge court for the Southern District of New York. The same Court has unanimously held that there is no reason for further delay of the already long-delayed Penn-Central merger and that such a delay might well result in "devastating hardship * * * to New England and New York" by blocking the only solution for the "critical situation of the New Haven." (B&O J. S., p. B-70)

N&W, its would-be merger partner C&O, and the latter's family lines B&O and Western Maryland continue, however, to seek further delay of consummation of the Penn-Central merger.[1] Indeed, their present position is a

[1]These appellants will herein be referred to as "appellants". When the contentions of E-L and D&H are discussed those appellants will be specifically identified.

further progression of their demands in terms of the duration of the delay sought. Originally in the District Court, and in their jurisdictional papers to this Court on the prior appeal, they urged that the merger should be postponed until the final formulation of protective conditions for E-L, D&H and B&M. In their briefs on that appeal their demand was expanded to encompass delay until the N&W Inclusion case had been disposed of. They now urge that even if the Commission's order in the Inclusion case is upheld by this Court, the Commission's order authorizing the merger of Penn and Central must nevertheless be set aside.

The factual predicate of appellants' argument is the claim that there is "serious doubt" that the stockholders of D&H will accept inclusion in N&W on the terms set by the Commission (B&O J. S., p. 10), and that it is an "established fact" that B&M will remain outside any major system and the District Court "has implicitly so found." (B&O J. S., pp. 10-11)[2]

The fact is that D&H unreservedly supported the Inclusion order in the District Court. In oral argument before that Court on September 28, 1967, counsel for D&H advised the Court that the Board of that company had just previously "unanimously resolved that the D&H would recommend [to its stockholders] inclusion terms as fixed by the Commission." The District Court, noting this fact and also noting that the cash terms fixed by the Commission were substantially more favorable to D&H stockholders than the average 1967 market price of D&H stock, found itself "unable to take seriously the possibility that D&H stockholders will reject their directors' unanimous recommendation to accept the inclusion terms." (B&O J. S., p. B-66)

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[2]At some points in their Jurisdictional Statement appellants go even further to claim that the District Court "conceded" that B&M would not be included in N&W under the Inclusion order. (See, *e.g.*, B&O J. S., p. 9)

The sole stated basis for appellants' alleged "serious doubt" as to the acceptability to D&H of the inclusion terms ordered by the Commission is a statement that was made by the President of D&H, some five weeks *prior* to the action of the directors just referred to, that the D&H Board was then exploring possible alternatives to inclusion in N&W. The District Court evidently concluded that the fact that *after* the issuance of this statement the D&H Board, of which the Company's President, who appellants claim represents its largest stockholder, is a member, unanimously expressed approval of the inclusion terms was sufficient to set at rest any "serious doubt" as to D&H's future course.

Although the Court below found that "the situation as to B&M differs since the price fixed by the Commission for its stock is well below the current market" (B&O J. S., p. B-67), the Court did *not* find and it is by no means established that B&M will ultimately reject the terms set by the Commission. Appellants attempt to treat as demonstrating the certainty of such rejection a statement in B&M's brief in the District Court in the Inclusion case to the effect that B&M would prefer denial of its petition for inclusion to acceptance of the terms prescribed by the Commission. (B&O J. S., p. 8) A request by B&M for denial of its petition and a refusal to accept inclusion on terms prescribed by the Commission are, however, entirely different matters. If B&M's petition had been denied it would under the order in this case have had the absolute right to seek inclusion in Penn-Central, whereas should it reject the Commission's Inclusion order no such right would exist. Accordingly, B&M will, if its pending appeal in the Inclusion case seeking a higher price fails, be faced with the question whether to accept the price set by the Commission or to be left with a pure gamble that it can negotiate better terms in another transaction and that approval of such a transaction can be

obtained from the Commission. There is simply no basis for any suggestion that it is "established" that B&M will select the latter course.

ARGUMENT

The facts set forth above show that the primary premise of the arguments of B&O, C&O, N&W and Western Maryland, that one of the three protected roads will surely choose to forego the right to inclusion in the N&W system and another is likely to forego that right, is without basis. We shall show, however, that even if that premise is accepted the decision below was correct and should be summarily affirmed. We shall also show that the limited and contingent challenge made by appellants E-L and D&H to the Commission's order is without merit.

I. The Commission's Order Authorizing Consummation of the Penn-Central Merger Is Consistent with This Court's Mandate

Appellants' first claim of error is that the Commission's order authorizing merger of Penn and Central violates the mandate of this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967). The claim is made that the period during which the mandate forbade the Commission to permit Penn and Central to merge was not intended to end when the Commission issued an order providing an opportunity to E-L, D&H and B&M for inclusion in a larger rail system, or when its order providing such an opportunity had been reviewed by the District Court, or even when it had been reviewed by this Court. Rather, say appellants, this Court meant that Penn and Central might not merge until all of the named roads had actually been included in a larger rail system. Appellants press this argu-

ment although it has been disclaimed by all of the three roads whose inclusion is at issue, and to whose protection the prior opinion of this Court was directed.

This Court is, of course, the best judge of the meaning of its own mandate, and hence extended argument on this point would be superfluous. It is fair to state, however, that the implications of appellants' position are startling. E-L, D&H and B&M cannot, separately or together, be required against their will to accept inclusion in *any* rail system. Appellants are thus arguing that this Court has held that any one of these roads can by the simple device of refusing to accept fair and equitable inclusion terms set by the Commission permanently frustrate the Penn-Central merger, even though the Commission has determined that the merger will bring about large efficiencies and economies with consequent vast benefits to shippers and to the general public (327 I. C. C. at p. 491) and is necessary to permit Penn and Central to withstand the increasing challenge of the previously created N&W-Nickel Plate and C&O-B&O combinations (*id.* at p. 519), and that it is the only possible salvation for the New Haven (328 I. C. C. at p. 312; 330 I. C. C. at p. 361).

We submit that nothing in this Court's prior opinion suggests an intention thus to impair and derogate from the authority of the Interstate Commerce Commission to determine national transportation policy by placing its considered determination that the Penn-Central merger is in the public interest at the mercy of the wholly private interests of the stockholders of the three protected lines. We suggest that under this Court's mandate what the Commission was at most bound to do was to give E-L, D&H and B&M the *opportunity* for inclusion in a larger system on fair and equitable terms. And this the Commission has done.

Appellants themselves appear to shrink from the necessary implications of their own argument. Thus they urge that if the Commission had held that under no circumstances might E-L, D&H and B&M be included in the Penn-Central system "the stockholders of the protected roads would then have been obliged, as the only alternative to destruction by Penn-Central, to accept equitable terms from *the* system [N&W] in which the Commission found their inclusion to be in the public interest." (B&O J. S., p. 14)[3] The proposition is, of course, inconsistent with appellants' own argument as to the meaning of this Court's mandate. For if that argument were accepted the stockholders of the protected roads would on the stated hypothesis have had an additional alternative—to reject equitable terms from N&W and thereby prevent consummation of the Penn-Central merger.

II. The District Court's Affirmance of the Commission's Order Was Not Based on a Ground Entirely Different from That Relied upon by the Commission

Appellants argue that "the Commission expressly predicated its order in the *Merger* case on the assumption that the *Inclusion* order would be accepted by all three of the

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[3]It is not clear whether appellants contend that this Court's mandate itself required the Commission to make such a holding as to Penn-Central once it found inclusion in N&W to be in the public interest. Any such contention would be insupportable. The Commission had made it clear in its original report that the question whether inclusion of E-L, D&H and B&M, or any of them, in Penn-Central would be in the public interest was not at issue in and would not be decided in the N&W Inclusion case. (327 I. C. C. at pp. 530-31) This Court, in referring to the pendency of the N&W Inclusion hearings as making supportable a "short delay" in the Penn-Central merger, made not the slightest suggestion that it deemed an anticipatory determination of the kind referred to (which could not have been made in either the Penn-Central merger case or the N&W Inclusion case in the absence of additional evidentiary hearings directed specifically to the question) to be necessary or even appropriate.

protected railroads" (B&O J. S., p. 15), and that the District Court affirmed the Commission's order although making a contrary assumption. This, appellants urge, was a violation of the rule of *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947). It is unnecessary to accept appellants' invitation to follow them in drawing close distinctions between *Chenery* and such cases as *Massachusetts Trustees* v. *United States*, 377 U. S. 235 (1964), allegedly shown to be a precedent of narrow scope by the decision in *Labor Board* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965). For the fact is that the Commission did not, "expressly" or otherwise, predicate its Penn-Central order on any assumption of the kind stated by the appellants.

Appellants purport to find the alleged express predicate in passages of the Commission's opinion that are claimed to demonstrate that the Commission specifically rested its decision on a belief that the duration of the protective conditions that it prescribed to guard the traffic of E-L, D&H and B&M from Penn-Central would be relatively short since those roads were certain to be actually included in N&W pursuant to the Inclusion order.

Contrary to appellants' claim, the Commission was fully aware that it was possible that the Inclusion order would not be accepted by all three beneficiaries of the order, and its order authorizing the Penn-Central merger was not based on any assumption that such a consequence was not possible. This is demonstrated beyond reasonable dispute by the fact that in its report in this case dated June 9, 1967, the date also of its report directing N&W to accept the inclusion of the three protected lines, the Commission expressly recognized that the event that would terminate the effectiveness of the protective conditions would as to some or all of the protected roads not necessarily be their inclusion in N&W pursuant to the Inclusion order. In defining

the "protected period"—the period during which the protective conditions would remain effective—the Commission provided that as to each protected carrier it would end "on any date when * * * the inclusion of such protected carrier in a Railway System which includes Norfolk & Western Railway Company *or* any successor thereto, *or* in the Railway System to be operated by the merged company [Penn-Central] shall have been effected * * *." (330 I. C. C. at p. 362) (Emphasis added) If, as appellants urge, the Commission believed it certain that inclusion of all three lines would take place pursuant to the N&W Inclusion order, it would hardly have thus formulated and promulgated a provision in which such inclusion was stated as only one of three different possibilities. Appellants' argument that a basic premise in the Commission's approval of Penn-Central was that the protected period was certain to end with inclusion of all three protected lines in the present N&W pursuant to the current Inclusion order plainly cannot survive in the light of the quoted provision.

III. The Commission Considered and Properly Rejected the Claim That the Protective Conditions Will Injure Appellants

Appellants claim that the Commission's order authorizing the merger of Penn and Central must be set aside because the Commission failed to consider the consequences that the protective conditions which it adopted would have if those conditions were to have an "indefinite duration." (B&O J. S., p. 19).

As we have shown above and the District Court found, there is no reasonable basis for anticipating that the protective conditions will have other than a very brief duration at least as to E-L and D&H because the former has accepted and the latter is virtually certain to accept the terms for inclusion in N&W that the Commission has tendered

them. In any event, again as we have shown above, the Commission did recognize that it was possible that the protective conditions would not be terminated with an inclusion of the three roads in N&W pursuant to the present Inclusion order, and contrary to appellants' contention the Commission's findings that the protective conditions would not cause substantial injury to appellants did not depend on any assumption that they would be terminated by any such event.

Appellants rely on a reference in the Commission's report to the prospect of a "relatively short" protected period and on a statement that the protected lines would act in the expectation that they would become affiliates of N&W. There is no basis for appellants' assumption that the Commission, in referring to a "relatively short" protected period, assumed inclusion of the three protected roads in N&W. In its prior report in this case the Commission used precisely the same term—"relatively short"—to describe the period that would elapse prior to the time the petitions of E-L, D&H and B&M "for inclusion *in one of the larger carrier systems* are acted upon." (328 I. C. C. at p. 327) (Emphasis added)[4] And a reading of the pertinent portion of the Commission's opinion shows that the findings that the protective conditions would not unduly injure appellants were based on substantial grounds entirely independent of any question of the expectation of the protected lines as to their future. The Commission made separate, independent and self-sufficient findings on the questions of (a) power to act in a way that would injure appellants by

[4]It may be noted that contrary to appellants' implication, the reference in the Commission's opinion to a "relatively short" protected period occurs not in any discussion of the effect of the protective conditions on appellants but rather in an entirely separate passage rejecting a claim by Penn and Central that a 50% indemnity factor for compensating the protected lines for loss of traffic was unduly high. (330 I. C. C. at p. 350)

traffic diversion activities, and (b) motive so to act. It specifically found that "clearly the intervening railroads have failed to show that there is a likelihood of power in the protected railroads to effect the diversions claimed," and that conversely "it is a matter of geography that Penn-Central will be unable to substitute either B&M or D&H" (the two roads that appellants foresee as potentially not being included pursuant to the Inclusion order) for other railroads. (330 I. C. C. at p. 355) And although in the additional finding as to lack of motivation the Commission referred to the protected lines' expectation of becoming affiliates of N&W, it also rested on the risk of retaliation by N&W or rescission by the Commission of the protection accorded by the conditions in the event of manipulation of traffic routings. (*Ibid.*)

In the District Court appellants also urged that consummation of Penn-Central would tend to force any of the three protected railroads not included in N&W pursuant to the Inclusion order into Penn-Central. In rejecting this contention on a number of grounds, the Court noted that "N&W is fully protected by its right to oppose inclusion of any of the three roads in Penn-Central." (B&O J. S., p. B-18)

Appellants argue that this right is not sufficient because once the Penn-Central merger is consummated the Commission will surely override any protest by N&W on the ground that B&M can survive only by inclusion in the Penn-Central system. This argument gives insufficient recognition to the authority, the independence and the integrity of the Commission. If B&M should reject terms for its inclusion in N&W that the Commission has found to be fair and that have been affirmed on judicial review the present orders of the Commission give B&M no right to inclusion in Penn-Central. If it should seek approval in a new proceeding based on a voluntary agreement with Penn-

Central it has no assurance that the Commission would find such inclusion to be in the public interest. There is no warrant for the assumption that in those circumstances the Commission would be forced to approve inclusion in order to save B&M from extinction. A denial of inclusion would not doom B&M. Rather, the result of such a denial would likely be to make B&M receptive to an offer from the present N&W system, or from any successor system that may emerge from the N&W-C&O merger application currently before the Commission. Indeed, this would appear to be the thrust of appellants' own argument that the way to get B&M into the N&W system is to foreclose its entry into Penn-Central. The difference between that argument and the possible sequence of events described above is that appellants demand that the Commission *now* make a determination that is in every sense premature.

IV. The Commission Correctly Found That the Merger of Penn and Central Subject to the Protective Conditions Is in the Public Interest

Appellants also argue that the Commission's order approving the merger of Penn and Central must be set aside because the Commission allegedly made no findings with respect to the public interest in consummating the merger "so long as it must be subject to [the protective conditions] for an indefinite period." (B&O J. S., p. 27) It is claimed that "the undisputed evidence of record showed that there could be no substantial merger savings or public benefits from the merger" during the protected period and that the Commission wrongly ignored this fact in authorizing prompt consummation. (*Ibid.*) There are several fatal difficulties with this argument.

First, appellants' argument is premised on the proposition that the protective conditions will cause substantial injury to them and to other Eastern railroads and that this

injury must be weighed against any benefits to be derived from the Penn-Central merger. As we have shown above, the Commission correctly rejected appellants' claims of such injury on the ground that the claims had not been established by the evidence, and did not rest its rejection on any assumption as to the duration of the protected period. For this reason, contrary to appellants' suggestion there was no "imposition of harm upon other railroads" (B&O J. S., p. 26) against which the benefits of the merger had to be weighed.

Second, in claiming that the protective conditions prevent the realization of any merger benefits for the "forseeable future" (*id.* at p. 28), appellants lose sight of the fact that even accepting their own arguments it would be only B&M (and possibly D&H) that would be a beneficiary of the protective conditions for more than a brief period following affirmance of the Inclusion order. It is E-L that is the largest of the three protected lines and the one that is the most broadly competitive with Penn-Central. Thus even appellants must concede that as soon as the protected period ends as to E-L, although remaining in effect as to B&M or even B&M and D&H, Penn-Central will be free to proceed to accomplish a large part of the public and private benefits of their merger.

Third, despite appellants' unwillingness to recognize the fact, the protective conditions would not, even if remaining in effect as to all three protected roads for a substantial period of time, cancel the merger benefits for that period, and the Commission has so found.[5] The Commission rec-

[5]It is noteworthy that C&O-B&O, in their Petition for Reconsideration of the Commission's April 6, 1966, order, argued (at pp. 10-11), contrary to their present position, that even during the protected period Penn-Central would be able to make extensive service improvements, and indeed that this was itself a reason for delaying the merger because the improvements would allegedly be channelled toward the areas in which C&O-B&O and other "unprotected lines" operate.

ognized that the savings and efficiencies of the merger would to a large extent be brought about by a "program of extensive capital improvements scheduled over a 4-year period." (327 I. C. C. at pp. 489-90) It recognized also that "a day's delay at the outset of the undertaking can only mean a day's delay at its conclusion, and, thus, every day that consummation is postponed denies the shipping and consuming public, as well as the management and owners of these railroads, the many benefits which we found stem from the transaction we approved." (328 I. C. C. at p. 312) Appellants persist in treating the consolidations and capital improvements that the merger will make possible as if they will be completed—and cause traffic diversion in violation of the protective conditions—the moment they are begun. There is no basis in the evidence or in reason for any such assumption. As the District Court recognized and as is apparent from the face of the protective conditions, nothing in them "prevents the realignment of management, the elimination of many duplications in personnel, the undertaking of financing, or the refurbishing and, in many cases, the implementation of plans for better and more economical service." (B&O J. S., p. B-15) Until Penn and Central are merged, none of these undertakings can be even begun. And each day of delay in the beginning is a day's delay in the ultimate accomplishment.

Appellants assert that N&W introduced evidence showing that "under the prescribed conditions savings could not be achieved in any of the areas mentioned by the district court." (B&O J. S., p. 28) Not only was the testimony in question, consisting of only four pages of general opinions, thoroughly discredited on cross-examination (Tr. 21733-67), but more important it was simply not germane to the point here under discussion. The relevant question is not whether Penn-Central will accomplish large savings immediately upon merger, with or without the protective con-

ditions, but rather whether the protective conditions will altogether prevent them after merger from taking steps that will in due course result in better service and financial savings. Neither the testimony to which appellants refer nor any other evidence of record permits an affirmative answer to this question.

In its report dated June 9, 1967, in which the Commission formulated final protective conditions for E-L, D&H and B&M, it considered and rejected the contention that Penn and Central should not be permitted to proceed with their merger prior to inclusion of the three lines because the conditions would make impossible the realization of merger benefits. Stating that it adhered to its conclusion that prompt consummation of the merger should be authorized, the Commission said (330 I. C. C. at p. 361):

> "We would note at this point that preliminary reports of earnings of eastern railroads for the first quarter of 1967 generally reflect a substantial decline from levels reached in the first quarter of 1966. First quarter net railway operating income of the eastern carriers totaled $71.3 million in 1966, compared with $31.3 million for the same period of 1967. Both PRR and NYC have shared in that decline, with NYC in particular showing a deficit of approximately $2 million from its transportation operations for the first 3 months of 1967. In our view, the public interest requires that the applicants be permitted to commence achieving the substantial savings which their merger will make possible at the earliest possible date. Similarly, the shipping public should not be denied the improved service which ultimately the merged company can provide."[6]

[6]The financial trends referred to in this passage have continued through the first three quarters of 1967. (See our Motion to Affirm in No. 835, p. 14 n. 6)

Both the Commission and the District Court recognized that a highly important benefit of prompt consummation of the Penn-Central merger will be the beneficial impact it will have on the critical situation of the New Haven. Appellants cannot contend that this merger benefit is one that will be impossible of accomplishment so long as the protective conditions are in effect. Rather, they are reduced to arguing that "it seems plain in principle" that a prompt merger of Penn and Central cannot be justified on the ground that it will save the New Haven. (B&O J. S., p. 29) If anything "seems plain in principle" it is that the Commission was fully justified in considering the plight of the New Haven as a factor militating strongly toward prompt consummation of the Penn-Central merger. But plain in principle or not this is precisely the kind of judgment that Congress has entrusted to the Commission, and appellants' suggestion that the Commission should have concluded that this consideration was outweighed by others presents no substantial issue of law for determination by this Court.

In their statement of Questions Presented, appellants purport to tender the question whether the protective conditions formulated by the Commission create a pooling arrangement within the meaning of 49 U. S. C. § 5(1) and if so, whether the Commission made the necessary findings to support the arrangement. (B&O J. S., p. 4) Because appellants have failed to make the statement required by Rule 15(f) of this Court of the reasons why this question is so substantial as to require plenary consideration for its resolution, the question is not properly before the Court. In any event, the District Court was plainly correct in finding both that on the facts the conditions imposed by the Commission did not constitute a pooling and that even if they did, the Commission had made findings sufficient to legalize them under Section 5 (1), and we rest on the District Court's discussion of those questions. (B&O J. S., pp. B-10-12)

V. The Penn-Central Merger Should Go Forward Even if the Inclusion Case Is Remanded to the Commission

Appellants, without troubling to argue the point, simply assume that "if the *Inclusion* order is set aside, the order permitting consummation of the merger must also be set aside." (B&O J. S., p. 10) E-L and D&H press the same view. This position does not withstand examination.

The Commission has now unanimously found for the third time that the public interest will be served by prompt consummation of the Penn-Central merger. It made this finding after having prescribed definitive conditions that will protect the transportation services of E-L, D&H and B&M pending the inclusion of those lines in a larger system. We submit that this Court should now affirm that finding and permit consummation of the merger even if it determines that it is necessary to remand the Inclusion case to the Commission for further consideration.

A remand of the Inclusion case to the Commission would create no problems that justify further postponement of the Penn-Central merger. As the District Court pointed out, a remand responsive to the arguments advanced by B&M would facilitate inclusion of B&M in the present N&W system, not prevent it. (B&O J. S., p. B-69). If the remand were because of arguments advanced by N&W, the Commission would, again as the District Court pointed out, be in a position on the present record readily to make new or additional findings prescribing terms for the inclusion of the three protected lines in the present N&W system as favorable as those fixed by the present order (*ibid.*), or alternatively could prescribe less favorable terms if it deemed that result warranted. The Commission has already found inclusion of the three roads in N&W to be in the public interest. There is, therefore, no reasonable basis for an assumption that a remand would preclude an order directing inclusion of the three lines in the present N&W system.

Even if it were to be assumed that the Commission on remand would find that the three roads should not or could not be included in the present N&W, the Commission has made it clear that in such an eventuality it will promptly consider whether they should be included in Penn-Central or in some successor to the present N&W system. A remand therefore does not create any serious possibility that the three roads will not be included in a larger system—particularly since the Commission and all of the railroads involved have recognized that such inclusion is an essential consequence of the rearrangement of the railroad structure in the Eastern part of the United States. Pending realization of such inclusion the transportation services of the three lines will be protected by the conditions prescribed by the Commission.

The posture of this case is now significantly different from what it was when it was previously before this Court. Then the Commission had found that conditions were necessary to protect the transportation services of the three carriers pending their inclusion in a larger system but had not completed its task of prescribing these conditions. On those facts this Court held that the Commission had "failed to provide the very protection that it at the same time declared indispensable to the three roads" and accordingly that its conclusion that there should be prompt consummation of the Penn-Central merger could not be sustained under the Commission's own findings. (386 U. S. at p. 389) In those circumstances the Court expressed the view that the Commission should complete the then pending Inclusion proceeding which the Court assumed could be done in a "relatively short time." (*Id.* at p. 392) By prescribing definitive conditions that will safeguard the three lines pending their inclusion in a larger system the Commission has now provided the protection that it found was essential.

It has therefore removed the infirmity in its findings that led this Court to its prior holding.

The Commission is charged by law with the regulatory administration of the rail industry. It has here faced the problem of devising an accommodation and protection of a variety of competing and conflicting interests. It and the District Court have both unanimously found that prompt consummation of Penn-Central is in the public interest, in part because the situation of the New Haven is critical and capable of satisfactory solution by prompt consummation of the Penn-Central merger and by no other means. To permit any temporary imperfection in the Commission's present disposition of the Inclusion case to block consummation of the merger would be to substitute certain injury to the public that the merged system will serve and to the applicants, and certain disaster for the New Haven and the public which it serves, for what is in reality merely a theoretical doubt that E-L, D&H and B&M, protected by the conditions imposed by the Commission in the meantime, will with reasonable promptitude find their place in a larger system.

VI. The Commission Did Not Err in Declining to Reserve Jurisdiction to Impose a Capital Loss Indemnification on Penn-Central for the Benefit of E-L and D&H

Before the Commission E-L and D&H argued that if the terms of their inclusion in N&W should be reduced because of the impact of Penn-Central on their traffic, Penn-Central should be required to pay their security holders an amount equal to the reduction caused by this impact. The Commission declined to reserve jurisdiction to consider the payment of such a capital indemnity on the ground that it had found in the Inclusion case that E-L and D&H will suffer no capital loss as a result of the Penn-Central merger

because that merger will not detract from their value to the N&W system. (330 I. C. C. at pp. 359-60) Although E-L and D&H now contend that these findings of the Commission are valid and should be affirmed, they also argue that the Commission erred in failing to reserve jurisdiction to provide for a capital indemnity payment against the chance that the findings might be set aside on judicial review and the possibility that on remand the Commission might find it necessary to fix terms for their inclusion in N&W that reflect a diminution in value caused by the Penn-Central merger. (E-L J. S., pp. 8-11)

This argument, even on the contingency that it assumes, is without merit. It presupposes that the Commission has authority that is not conferred upon it by the Interstate Commerce Act. The power of the Commission under Section 5(2)(b) to prescribe conditions to a merger transaction is not unlimited. It can only prescribe conditions that are reasonably related to the public interest standard of the section. (*United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311 (1931)) The public interest standard is confined to matters that are directly related to "adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25 (1932))

The payment of a capital indemnity as suggested by E-L and D&H is not authorized by the statutory standard. Once E-L and D&H are included in N&W, their former security holders will have no responsibility for or relation to the preservation of adequate transportation service. The payment of money to those security holders would not promote adequacy of transportation service or have any other relationship to the public interest standard of Section 5(2)(b). A condition requiring such payments would,

therefore, be beyond the scope of the Commission's authority.[7]

It should be noted that a requirement for capital payments of this kind would be based on a rationale entirely different from that which authorized the Commission to provide for indemnity payments to E-L, D&H and B&M to compensate them for any loss of traffic that they may suffer by reason of the Penn-Central merger prior to their inclusion in a larger system. In the latter circumstances the purpose of the payment would be to preserve the transportation services of the three roads rather than merely to compensate private shareholder interests.

E-L and D&H attempt to establish a relationship between the suggested capital indemnity payment and the statutory standard by an argument that assumes that any lowering of the terms for their inclusion in N&W because of the impact of the Penn-Central merger on their traffic would not be "equitable" within the meaning of Section 5(2)(b). From that premise they argue that if the Inclusion order is reversed on grounds involving a rejection of the Commission's findings that the value of E-L and D&H to N&W will not be decreased by the Penn-Central merger, the Commission may not be able without imposing a capital indemnity to fix equitable terms for the inclusion of E-L and D&H in N&W; that it may subsequently find that the inclusion of E-L and D&H in Penn-Central would not be in the public interest; and that in those circumstances the service rendered to the public by E-L and D&H will be destroyed. (E-L J. S., p. 10)

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[7]This ground for affirming the refusal of the Commission to reserve jurisdiction to provide for capital indemnity is not precluded by SEC v. Chenery Corp., 332 U. S. 194 (1947). That case holds that when an agency acts within the scope of its delegated authority its decision cannot be affirmed on grounds not adopted by the agency. Its rationale does not apply when no question of administrative judgment is involved and when the only issue is whether the agency has statutory authority to grant the relief requested.

The legal premise of this argument is unsound. The statute provides no support for the assumption that terms for inclusion of E-L and D&H in N&W would not be "equitable" within the meaning of Section 5(2)(b) if they were to reflect any diminution in the value of the two roads that might be found to have been caused by the Penn-Central merger.

The security holders of E-L and D&H, like the security holders of other companies, are subject to the risk that the merger of their companies' competitors pursuant to valid regulatory authorization may impair the value of their securities. Nothing in the Interstate Commerce Act requires the Commission to provide for compensation for such impairment. When the Commission fixes terms for inclusion pursuant to its authority under Section 5(2)(b) it is obligated to compensate security holders for the actual economic value of their securities under all the circumstances. But the statutory concept of "equitable terms" does not require that economic value be determined on any artificial assumption that railroad security holders are to be held harmless from the consequences of lawful action taken by others pursuant to Commission authority. There is no rule of law that requires the Commission in setting equitable terms for the inclusion of a railroad to ignore any decrease in the economic value of the railroad caused by a collateral exercise of the Commission's regulatory power, and therefore no basis for the assumption of E-L and D&H that any terms for their inclusion in N&W fixed by the Commission that reflected traffic losses suffered by them as a result of the Penn-Central merger would not be "equitable."[8]

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[8]Compare the District Court's holding that the New Haven would not be entitled to compensation for traffic diversion caused by the Penn-Central merger if it were ultimately liquidated:

> "* * * we find nothing in the Interstate Commerce Act that would compel the Commission to require an operating railroad such as Penn-Central to reimburse creditors of a defunct one for losses due to merger diversion." (B&O J. S., p. B-30)

CONCLUSION

For the foregoing reasons, the judgment of the District Court dismissing the complaints of C&O-B&O, N&W, Western Maryland, E-L and D&H should be summarily affirmed.

Respectfully submitted,

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Nos. 778 & 779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

NORFOLK & WESTERN RAILWAY COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

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IN THE

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OCTOBER TERM, 1967

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UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Southern District of New York

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the Railway Labor Executives' Association (Association) moves that the judgment of the District Court be affirmed insofar as it sustains orders of the

Interstate Commerce Commission (Commission) imposing *inter alia* protective conditions for the benefit of the employees of Erie-Lackawanna Railroad Company (EL), The Delaware and Hudson Railroad Corporation (D&H), and Boston and Maine Corporation (B&M).

STATEMENT

These are direct appeals from the final judgment of a three-judge district court dismissing complaints of appellants which sought to set aside orders of the Commission requiring the inclusion, subject to specified conditions, of the EL, D&H, and B&M into the Norfolk and Western Railway Company (N&W) system.

Among the conditions imposed upon the N&W by the Commission was a requirement that employees of the included railroads (EL, D&H and B&M) be granted protection in their employment identical to that granted employees of the N&W, the New York, Chicago & St. Louis Railway Company (Nickel Plate) and the Wabash Railroad Company (Wabash) in consummation of the merger of the Nickel Plate into the N&W and the lease of the Wabash by the N&W. In addition, the Commission imposed an "employee freeze" for the benefit of the employees of the included railroads for a 60-day period following the effective date of its order to allow the N&W and the representatives of the employees of the included railroads to negotiate and execute agreements to provide for employment protection.

On this appeal, as in the court below, the interests of the Association are limited to the issue of the conditions imposed for the protection of the employees of

the EL, D&H and B&M. An issue as to the lawfulness of such conditions is presented as Question No. 6 at page 3 of the Jurisdictional Statement filed with this Court by the N&W.

The court below, at pages 32 and 33 of its pamphlet opinion, which is attached as Appendix B to the Jurisdictional Statement of the N&W, held that the "Commission acted within its power in requiring N&W to protect employees of the three roads as thoroughly as those of the roads it was permitted to absorb only on the condition that it would accept these lines if the Commission so directed." The court further held that the Commission did not abuse its discretion in imposing the 60-day "employee freeze" because the N&W "would scarcely be making work reassignments in this brief interval, and we see no basis for its fear that the freeze would continue during possible litigation of a Commission decision allowing work reassignments."

In the body of its Jurisdictional Statement filed herein, the N&W does not address itself to the alleged error of the District Court in sustaining the employee protective conditions imposed by the Commission. The phraseology of its Question No. 6, however, indicates that the N&W believes that the Commission departed "from established administrative precedent in . . . fixing labor conditions"; that "the Commission did not justify its action with rational findings"; and, that the District Court erred in sustaining the Commission's action in this matter.

ARGUMENT

The decision of the District Court is plainly correct as concerns the imposition by the Commission of employee protective conditions. Section 5(2)(f) of the

Interstate Commerce Act [49 U.S.C., § 5(2)(f)] requires the Commission to effect "a fair and equitable arrangement to protect the interests of railroad employees affected" by orders issued under the provisions of that section. Section 5(2)(c)(2) [49 U.S.C., § 5(2)(c)(2)] requires the Commission to give weight to "the effect upon the public interest of the inclusion . . . [of] other railroads in the territory involved in the proposed transaction."

Appendix O to the Commission's report and order approving the absorption of the Nickel Plate and Wabash by the N&W specifically provided that the Commission would retain jurisdiction to direct the inclusion into the N&W system of the EL, D&H and B&M if "found consistent with the public interest . . . under such terms as may be found equitable to all parties involved" (324 I.C.C. at 148; see also N&W Jurisdictional Statement at pages 4 and 5). In accepting authority to take over the Nickel Plate and the Wabash, the N&W accepted the provisions of Appendix O.

The Commission found that on the basis of the evidence of record "the imposition of the so-called attrition conditions will not impose a significant burden on any of the carriers involved" (330 I.C.C. at 824). The Commission further found "that N&W has voluntarily consented to that arrangement for its present employees and we see no reason for exempting similarly situated employees of petitioners [EL, D&H, B&M]" (330 I.C.C. at 824).

The courts, quite properly, have declined to substitute their judgment for the judgment of the Commission based upon the evidence presented to the Commis-

sion. *Chicago, St. Paul, Milwaukee & Omaha R. Co. v. U. S.*, 322 U.S. 1, 2-3 (1944). In the instant case the Commission's findings clearly disclosed that they were based upon sufficient evidence; do not depart from, but follow, established administrative precedent; and, indeed, were supported by the Commission's laudable desire to insure that employees of the included railroads would not be discriminated against in terms of employment protection which they would be afforded as employees in the N&W system.

As the District Court found, the Commission neither abused its discretion nor exceeded the limits of its delegated authority in providing for the protection of the employees of the included railroads.

CONCLUSION

It is respectfully submitted that the appellants present no substantial question for the decision of this Court as concerns the employment protection granted employees of the EL, D&H and B&M, and the judgment of the District Court should be affirmed.

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Nos. 778 and 779

IN THE

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OCTOBER TERM, 1967

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Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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On Appeal from the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee Boston and Maine Corporation[1] (B&M) moves that the final judgment and order of the district court with respect to the *Penn-Central* merger proceedings, No. 778, October Term, 1967, be affirmed, and that the final judgment of the district court in the *N&W Inclusion* case, No. 779, October Term, 1967, be affirmed in part, that is, with respect to

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[1] B&M is an appellee in No. 778, the Penn-Central merger case, and in No. 779, the N&W Inclusion case, insofar as the arguments of N&W are concerned. B&M, in No. 833, appeals in part from the judgment below in the N&W Inclusion case.

the challenges thereto asserted by Norfolk and Western Railway Company (N&W), on the grounds that the questions raised in both appeals are insubstantial.

STATEMENT

The action to enjoin consummation of the merger between the Pennsylvania and New York Central railroads is before this Court for the second time. Since the opinion of this Court of March 27, 1967,[2] the Commission has issued a final order in the *N&W Inclusion* proceedings, has restored the provisions calling for indemnification of the three protected lines until their inclusion in a major system,[3] has strengthened the conditions designed to protect their traffic, and has found that no capital indemnification is necessary because no loss of capital value will occur to the protected lines as a result of the Penn-Central merger.

B&M did not participate in the prior review of the Penn-Central proceedings in this Court because it had concluded that its eventual inclusion in a merged system would be speeded and assisted by early consummation of the Penn-Central merger, and therefore took no part in efforts to delay the merger further. B&M adheres to that view. See the affidavit of its chief executive officer, Richard J. Mulhern, filed in the district court on September 12, 1967, App. A hereto, p. A-2, and discussed *infra*.

The *N&W Inclusion* case is before this Court for the first time. B&M moves to affirm the judgment and order

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[2] *Baltimore & Ohio Ry. Co.* v. *United States*, 386 U.S. 372 (1967).

[3] It would appear fair to characterize as the principal grounds for this Court's earlier reversal the Commission's withdrawal of the indemnity provisions which it had earlier found to be a necessary part of the protection to be accorded E-L, D&H and B&M against the effects of the Penn-Central merger pending their inclusion in a merged system.

of the court below only insofar as N&W's challenges to that order are concerned. B&M has instituted its own appeal, No. 833, October Term, 1967, seeking reversal in part and remand to the Commission for further hearings and consideration of the terms for B&M's inclusion in N&W, particularly with respect to the amount of savings (and traffic gains) which would be realized under the type of control which the Commission found N&W will exercise over B&M as a subsidiary. Therefore, B&M seeks only partial affirmance of the district court's judgment in the N&W inclusion case. The history of that proceeding is reviewed in B&M's Jurisdictional Statement in No. 833 and in B&M's brief filed with the district court.

ARGUMENT

All of N&W's [4] contentions in both appeals must be analyzed in the light of its goal to realize its proposed merger with C&O-B&O prior to or contemporaneous with the consummation of the Penn-Central merger and prior to (or instead of) the inclusion of B&M, D&H or E-L, in the N&W system. The Commission, after noting that it has been engaged continuously for almost seven years in these related merger transactions, commented with respect to N&W's opposition to Penn-Central: [5] "it is lodged primarily as tactical support of the proposed N&W-C&O merger. . . ." The substantiality of questions raised in N&W's appeals must be viewed and examined in the light of the public interest. While the responsible administrative agency has made

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[4] The arguments advanced in the jurisdictional statements in Nos. 778 and 779 will be referred to herein as N&W's arguments. Baltimore and Ohio, Chesapeake and Ohio, and Western Maryland are also parties appellant in No. 778.

[5] Norfolk and Western Railway Co. and New York, Chicago and St. Louis Railroad Co.—Merger, Etc., 330 I.C.C. 780, 785-86 (1967).

affirmative findings concerning the public interest aspects of the merger of Penn and Central and of the inclusion of the three petitioning carriers in the N&W system, it has not done so with regard to the N&W-C&O merger. N&W's effort to make every other public and private interest in these proceedings subordinate to its consuming interest in its next merger lacks the strength that such a finding would give it.

THE PENN-CENTRAL MERGER CASE

In its Jurisdictional Statement in the *Penn-Central* case, No. 778, N&W's first "substantial" point is an assertion that D&H may not, and B&M assuredly will not, accept the Commission's determination as to terms of inclusion and, therefore, the Commission and district court have both erred in permitting the Penn-Central merger to be consummated before it has been finally determined in what system E-L, D&H and B&M will be placed.

N&W expressly premises that argument, and each other argument which it raises on this appeal, on the fact that "B&M will remain outside of any major system even though the Commission has found that it will thereby be threatened with destruction."[6] That premise is without foundation in fact and is erroneous for it ignores the fact that the Commission has reimposed the provisions of Appendix "G" for the purpose of affording B&M the protection it requires pending B&M's inclusion in a major system. B&M accepts those provisions as satisfactory and its co-petitioners E-L and D&H took no exception to them after they were issued by the Commission. The court below stated:[7]

> "We would not feel warranted in overruling the Commission's informed judgment, concurred in in-

[6] N&W (B&O) Jurisdictional Statement, No. 778, p. 11.

[7] Id. at App. B, p. B-68.

itially by all three of the affected railroads and still accepted by B&M, that proper Appendix G provisions take sufficient care of them while they work out their future . . . ."

The revised Appendix "G" conditions of June 9, 1967, include strengthened traffic protection conditions and reimposed indemnification provisions. They are intended to "obviate impairment or serious weakening of E-L, D&H or B&M or the rendering of them individually or collectively substantially less capable of providing service to their shippers and connections." [8] The Commission's order makes the protective conditions available to safeguard B&M during the time necessary for a remand of the N&W inclusion case to the Commission for further hearings and consideration of B&M's claim that the Commission set B&M's terms of inclusion too low in erroneous disregard of the substantial savings which B&M would bring to the N&W system. The Commission specifically reissued Appendix "G" conditions to provide for the circumstance which would exist "if, for any reason," [9] there would be an interim between merger of Penn-Central and inclusion of B&M.

Quoting portions of this Court's earlier opinion, N&W concludes that the mandate of this Court has been violated by authorizing consummation of Penn-Central now. The question was briefed exhaustively and, we submit, correctly decided in the district court.[10] We emphasize only that one overriding consideration in the earlier opinion of this Court was that the delay in implementing a merger which promises great benefits to the public would be at most a short delay,[11] whereas if N&W's self-oriented

[8] 330 I.C.C. 333 (1967), citing 327 I.C.C. 532 (1966).

[9] 330 I.C.C. 329.

[10] N&W Jurisdictional Statement, No. 779, App. B, p. B-63 et seq.

[11] 386 U.S. 372 at 392.

interpretation is correct, the delay may be a lengthy one indeed.

N&W's second attempt to show the existence of a "substantial" question in the Penn-Central case is based upon a misreading of the reissued Appendix "G" which the Commission very carefully revised following hearings and the submission of briefs and reply briefs by the parties.[12]

N&W would read the Commission's revised Appendix "G" and its accompanying report to mean that its protection is to be available to the three smaller lines only during whatever short period of time might elapse between consummation of Penn-Central and the fully completed inclusion of the three petitioners in N&W. On the other hand, claims N&W,[13] the district court saw in Appendix "G" the means of protecting the petitioners while they work out their future—in N&W or otherwise. Thus, argues N&W, the district court decided the case on a basis which differed from that relied upon by the Commission. What N&W's argument overlooks is the plain wording of paragraph 1(b) of the revised Appendix "G."[14] It specifically contemplated that the "protected period" for the three petitioners would last from the date of the consummation of Penn and Central until inclusion of the protected carrier in a system embracing N&W or a successor thereto or the system to be operated by the merged company (Penn-Central). The wording of the revised Appendix "G" and the report's discussion[15] of the definition of protected period leave no doubt that with respect to each protected line, this protection was intended

[12] 330 I.C.C. 332.

[13] N&W (B&O) Jurisdictional Statement, No. 778, p. 15, citing App. B thereto, p. B-68.

[14] 330 I.C.C. 362.

[15] Id. at 335.

by the Commission to last at least until its inclusion in a major system embracing N&W, or a successor thereto, or Penn-Central.

N&W's third argument for the purpose of showing that "substantial" questions exist is that the Commission failed to pass upon N&W's claim that Appendix "G" conditions of "indefinite" duration will substantially injure the unprotected eastern railroads. N&W reviews the testimony it proffered to the effect that a revenue pool would be created, and that a community of financial interest between Penn-Central and the protected carriers would induce all of those lines to route traffic to one another. N&W admits that the Commission considered its contentions and rejected them, but apparently bases its claim that the Commission has never passed on its argument on its assertion that the Commission rejection was firstly "on the express ground that harm to the public and to the other eastern railroads could not result because Appendix G would be in effect only for a 'relatively short' period of time (330 I.C.C. at 350) . . . ." [16] N&W's claim of express reliance by the Commission is at best dubious since, at the page referred to, the Commission was discussing the adequacy of a 50 percent indemnification ratio and was not dealing with the rejected N&W contentions. N&W argues that the Commission's second basis for rejecting N&W's contentions was that the protected carriers expect to become affiliates of N&W and therefore would not divert traffic from N&W. N&W states flatly that B&M does not regard itself as a prospective affiliate of N&W.[17] That N&W has misconstrued B&M's aims is made clear by the affidavit of Richard J. Mulhern attached hereto as Apendix A. Having lost both of its supports, N&W's third argument falls.

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[16] N&W (B&O) Jurisdictional Statement, No. 778, p. 21. See 330 I.C.C. 353-59, where N&W's contentions are discussed.

[17] Ibid., and N&W Jurisdictional Statement, No. 779, p. 21.

N&W's fourth attempt to show a "substantial" question in the *Penn Central* case builds upon the third. Now terming as a "permanent" Appendix "G" what it previously had called an "indefinite" Appendix "G," N&W goes on to claim that the Commission failed to determine whether the Penn-Central merger would be in the public interest, given a permanent Appendix "G." Certainly no person can say how many days or months it will take to resolve the eastern rail merger problems and to include each of the protected carriers in a system. However, the Appendix "G" provisions are in essence temporary and the Commission, which manifestly intends to keep them temporary, has in its supplemental order of June 9, 1967, retained jurisdiction of these proceedings "for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate . . . ." [18]

N&W INCLUSION CASE

N&W's first argument to show the existence of a substantial question in the *N&W Inclusion* case is that the Commission has not found that any public interest will be served by directing N&W to acquire the stock of deficit railroads. N&W's argument begs the question whether the Commission's finding was proper when it terms the petitioners "deficit" railroads; the Commission specifically found that when traffic gains, control savings and other specific adjustments are considered, none of the petitioners will be deficit railroads. As a carrier which is already realizing $12 million per year in savings [19] from its 1964 consolidation with Nickel Plate et al, N&W must realize it proves nothing by rehearsing figures as to past deficits.

N&W's second argument is that there are no findings to support inclusion of E-L alone or E-L and D&H with-

[18] The supplemental order follows 330 I.C.C. 369. See also id. at 359.

[19] Transcript of final oral argument before Commission, F.D. No. 21510, April 13, 1967, p. 3893.

out B&M. N&W's jurisdictional statements in both of its appeals here frequently state that the rejection of Commission terms by D&H is a real possibility and their rejection by B&M a virtual certainty. While it cannot be said that N&W has suggested that it would welcome a requirement that it take E-L and D&H without accepting B&M as well, it is true that N&W's principal policy spokesman, Senior Vice-President John P. Fishwick, equivocated when the presiding officer at the *Inclusion* case hearings asked him whether N&W would actually want B&M if N&W were required by the Commission to accept E-L and D&H.[20] Further evidence of N&W's disinterest in B&M, and to a degree in D&H, was exhibited by N&W's counsel at the final oral argument in F.D. No. 21510 before the full Commission on April 13, 1967, where the following colloquy took place.[21]

> "Chairman Tucker. How much is that worth to N. & W.? The fact that B. & M. might not get into Penn-Central, how much is that worth to N. & W.?
>
> "Mr. Trienens: N. & W. would just as soon see Boston & Maine, and if Boston & Maine goes, let D. & H. go with them as far as N. & W. is privately concerned."

In sharp contrast, N&W has once again reversed its field and now claims that inclusion of B&M and D&H is of the utmost importance to the success of an N&W system which includes E-L. If the Commission erred, as N&W claims, in not making B&M and D&H inclusion mandatory,[22] then N&W led it into that error and cannot be heard to complain now.

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[20] Mr. Fishwick responded: "I don't really know. We haven't considered that possibility. It would depend, I think, on the price. . . ." Transcript, hearings, F.D. No. 21510, May 24, 1966, p. 1520.

[21] Transcript, pp. 3897-98; See also pp. 3918-19.

[22] N&W (B&O) Jurisdictional Statement, No. 778, p. 14.

N&W's final effort to show a substantial question is based upon its claim that the district court provided "a most extreme example of a reviewing court propelling itself into the administrative domain . . . ." N&W Jurisdictional Statement, No. 779, p. 26. The district court opinion itself provides the best answer to that argument.

B&M'S FUTURE

We turn now to a brief discussion of B&M's goals in these related proceedings. It appears important to do so since N&W's arguments in both of these appeals and its hopes for stopping everything until it achieves its proposed merger with C&O, all center about the possibility that N&W will not, in the N&W inclusion proceedings, acquire B&M, a railroad N&W has castigated as having debt greater than the value of its equity and which, N&W says, serves a slowly growing part of the country where railroads are in a "stagnant" condition.[23]

N&W's Jurisdictional Statement in No. 779 is completely in error in asserting that B&M does not regard itself as a prospective "affiliate of N&W," and that B&M is already an "ally of Penn-Central, having realigned itself as a defendant in the Penn-Central litigation."[24] It has been made perfectly clear that B&M does regard itself as a prospective affiliate of N&W. That is the reason B&M is appealing from the Commission's erroneous failure to accord B&M adequate credit for the contributions it would make to an N&W system. B&M's continuing interest in becoming a part of the N&W system on equitable terms is stated unequivocally in the affidavit of its chief executive officer filed with the court below on September 14, 1967. (Appendix A, p. A-3). If

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[23] N&W Opening Brief, F.D. No. 21510, Sept. 19, 1966, p. 83 et seq; Transcript, hearings, F.D. No. 21510, May 23, 1966, p. 1325.

[24] N&W Jurisdictional Statement, p. 21.

B&M is not successful in getting into the existing N&W system at this time, B&M would be willing to attempt to negotiate terms for its inclusion in the N&W-C&O system, even though B&M realizes that their proposed merger faces serious obstacles and that N&W's chief executive officer has termed the N&W-C&O proposal to B&M a "take it or leave it proposition." Only if both of those possibilities fail will B&M turn to other alternatives to assure a continuation of its essential services. One of those would be to become a part of the Penn-Central system. For its own purposes, N&W has persistently ignored the priority which B&M has assigned to inclusion in an N&W system. N&W's alleged "hard fact . . . that B&M is already an ally of Penn-Central" [25] is not a fact at all.

Turning to N&W's allegation that the stand which B&M has taken in the *Penn-Central* case proves that it is an ally of Penn-Central, N&W is well aware of the reasons why B&M has realigned itself as a defendant therein. B&M came many months ago to the conclusion, set forth in the affidavit of its chief executive officer filed in the proceedings below, (App. A, p. A-3) that:

> "N&W will continue to resist B&M's merger progress at least until such time that it is faced with competition from Penn-Central. Therefore, if the protective traffic and indemnity provisions of Appendix 'G' are judicially upheld, the vital interest of B&M and the public it serves in securing B&M's early inclusion in a merged system is best served by the consummation of a Penn-Central merger without further delay."

So long as N&W is free to enjoy the fruits of its already consummated merger with Nickel Plate and its acquisition of Wabash and several smaller lines without being faced with competition from Penn-Central, N&W will be free also to continue its strategy of thwarting the inclusion efforts of B&M, of refusing to negotiate terms for

[25] Ibid.

B&M inclusion in N&W or in N&W-C&O—and of attempting to secure the strategically located properties of the B&M at a price substantially less than their value.

N&W's hard words to the effect that B&M's purpose is to ruin D&H and severely injure E-L [26] are accompanied by a quote from one of B&M's briefs in the cause below which is lifted out of context from the middle of a paragraph. A point which B&M has frequently made in its briefs in these proceedings is that B&M has a strategic value to any of the three possible major systems because it originates and terminates the vast majority of traffic it handles [27] and therefore has direct contact with shippers and consignees, an advantage which is generally recognized as affording a carrier the opportunity to influence them to use its long haul. N&W's strategy in the instant proceeding is to ignore this aspect of B&M value, and with respect to B&M's third possible alternative home, the Penn-Central system, to attribute any desirability of that inclusion solely to anticompetitive effects. A reading, in context, of the portion of B&M's brief below to which N&W referred demonstrates clearly that B&M was addressing itself to its considerable strategic value as a compelling reason for a remand of the case to the Commission for a reassessment of B&M's worth to the N&W system in view of the Commission's findings as to the savings available through B&M inclusion in N&W.

Finally, we note that N&W faults the Commission [28] for its failure to decide which one of the systems was to be the home of the protected roads, with entrance to other systems foreclosed. In that instance, N&W suggests, the

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[26] N&W Jurisdictional Statement, No. 779, p. 21, N. 13, quoting from B&M Brief, Sept. 5, 1967, S.D.N.Y., 67 Civ. 2451, pp. 42-43.

[27] B&M Reply to Exceptions, F.D. No. 21510, April 1, 1967, p. 11 et seq.

[28] N&W (B&O) Jurisdictional Statement, No. 778, p. 14.

stockholders of the protected roads would have been obliged "as the only alternative to destruction by Penn-Central" to accept "the equitable terms" set by the Commission.

What N&W suggests is a consolidation of all of the cases in which B&M, D&H, and E-L are involved for the purpose of reaching a single decision as to their future. This suggestion comes with ill grace from the carrier which throttled the consolidation efforts of D&H and B&M in 1962 at a time when the *N&W-Nickel Plate-Wabash* proceeding was awaiting the examiner's report, the *C&O-B&O control* case was awaiting final consideration by the Commission, and the *Penn-Central* case was still in the hearing stage.

Anxious to reap the financial rewards of its then-pending merger, N&W vigorously opposed consolidation. The arguments which N&W's present Senior Vice-President used then to oppose the consolidation sought by the smaller carriers in 1962 are of interest in view of N&W's present and recent urging of consolidated consideration now that it is enjoying the fruits of its Nickel Plate-Wabash consolidation at a level of more than $12 million per year. Some of those arguments are set forth in Appendix B hereto, an excerpt from B&M's reply brief in the Appendix "G" proceedings before the Commission.

CONCLUSION

B&M respectfully submits, therefore, that the questions raised by N&W and its allies are not substantial. Accordingly, the judgment of the district court in the *Penn-Central Merger* proceedings, No. 778, should be affirmed, and the judgment of that court in the *N&W Inclusion* case should be affirmed in part, that is, with respect to the questions raised by N&W in No. 779, but should be reversed and remanded to the Commission for further hear-

ings and consideration on the points raised by B&M in No. 833.

Respectfully submitted,

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November 27, 1967

APPENDIX A

AFFIDAVIT OF RICHARD J. MULHERN
September 13, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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66 Civ. 2860 and Consolidated Actions

ERIE-LACKAWANNA RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

BOSTON AND MAINE CORPORATION,
Intervenor.

AFFIDAVIT OF RICHARD J. MULHERN

Commonwealth of Massachusetts)
) ss:
County of Suffolk)

RICHARD J. MULHERN, being duly sworn, deposes and says:

I am President and Chief Executive Officer of Boston and Maine Corporation (B&M), having been elected to that position by the Board of Directors of the Corporation in November of 1966. Prior to my assuming that position I served as Vice President—Law and in a number of other capacities with the Legal Department of B&M, having entered that department in 1958.

The purpose of this affidavit is to comply with the request for information set forth at pages 18 and 19 of this Court's Memorandum Order of July 3, 1967. To supplement the information contained in the affidavits already filed by other parties, I will state B&M's position with regard to the following three matters:

1. With respect to the grounds upon which B&M challenges the inclusion order, the position of B&M may be summarized here by incorporation by reference of the Summary of Argument which is set forth at pages 2-4 of the Brief of B&M as an intervening plaintiff in 67 Civ. 2451 which was filed with this Court on September 5, 1967, rather than by the summarizations by other parties in their affidavits.

2. With respect to this Court's suggestion of the "possibility of separate and expedited determination of the validity of the direction for inclusion, as distinguished from the terms," it is B&M's view that inequitable or illegal terms would of themselves vitiate any direction of inclusion, and that therefore the inclusion order must be reviewed as a whole.

3. With respect to the position of B&M as to "whether and why a further injunction is needed," it is as follows:

B&M opposes any further injunction against the consummation of the Penn-Central merger upon the conclusion of these proceedings, if this Court upholds the propriety of the protective traffic and indemnity provisions of Appendix "G". B&M opposes further injunctive relief under these conditions even if B&M should not, as the result of the inclusion case, become a part of the present N&W system.

B&M feels strongly that the public it serves and the B&M itself are adequately protected by the Appendix "G" provisions, as revised, and that no further delay of the Penn-Central merger is required. B&M does not, in

this proceeding, challenge any aspect of the protective traffic and indemnity conditions of Appendix "G". I understand also that D&H and E-L do not here attack those provisions, either on the basis of their inadequacy or on any other grounds.

The present course of these and related proceedings has justified the fears of the four dissenting justices as to what might be done by "ingenious counsel bent on delay". *Baltimore & Ohio R.R.* v. *United States*, 386 U.S. 372, 472 (1967). B&M has seen its effort to be included in N&W at what B&M considers a fair evaluation of its worth rebuffed by N&W at every juncture and on every conceivable ground. It is important to note that N&W, in its Brief filed with this Court on August 8, 1967, p. 12, is entirely incorrect in stating that B&M has all but announced abandonment of its effort to obtain inclusion in N&W. To the contrary, this Court correctly summarized B&M's position in the inclusion case at p. 4 of its Memorandum Order of July 3, 1967 in these proceedings where it stated that B&M supported direction of its "inclusion in N&W but challenge[s] the financial terms." As the result, in large measure, of N&W's resistance to B&M inclusion in its system, B&M has frequently suggested the alternative of a Commission denial of B&M's Petition for Inclusion in N&W followed by a B&M effort to secure inclusion in the Penn-Central system pursuant to the terms of Appendix "A" to the Commission's Report and Order in these proceedings of April 6, 1966.

I wish to make it clear that B&M still seeks inclusion in a system embracing the N&W, provided that such inclusion is on fair and equitable terms. Nevertheless, on the basis of its representations, we are convinced that N&W will continue to resist B&M's merger progress at least until such time that it is faced with competition from Penn-Central. Therefore, if the protective traffic and indemnity provisions of Appendix "G" are judicially

upheld, the vital interest of B&M and the public it serves in securing B&M's early inclusion in a merged system is best served by the consummation of a Penn-Central merger without further delay. Further reason for B&M support of prompt consummation of the Penn-Central merger is afforded by the fact discussed in B&M's Brief herein of August 28, 1967 at p. 6, that the realization of that merger is a prerequisite to B&M inclusion in any of the three systems presently being considered by the Interstate Commerce Commission for the Northeastern section of the United States.

With respect to whether the Commission has lawfully directed prompt consummation of the Penn-Central merger in view of all the circumstances, including the Supreme Court's decision of March 27, 1967, we note that circumstances have changed since March of this year: the Commission has issued revised protective traffic and indemnity provisions: one of the three railroads for the sake of which the merger was postponed (B&M) now actively seeks prompt consummation. B&M feels that a reweighing of the same factors which were considered by the Supreme Court last winter and were found, apparently, to be nearly evenly balanced will, when undertaken today, reveal that the balancing of all interests favors prompt consummation. (See this Court's Memorandum Order of July 3, 1967, p. 17, citing language at 386 U.S. 391.)

For the above reasons and because B&M feels that prompt consummation of the Penn-Central merger is in the public interest, B&M actively opposes any further injunction against the consummation of the Penn-Central merger after the conclusion of these proceedings before this Court, provided that the propriety of the protective conditions discussed above is upheld.

/s/

RICHARD J. MULHERN

Subscribed in my presence and sworn to before me by the affiant above-named this 13th day of September, 1967.

/s/ .....
Notary Public

My Commission expires:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Affidavit was served by me by first class mail, postage prepaid, this 14th day of September, 1967, upon all parties of record herein.

/s/ James A. Belson
JAMES A. BELSON

APPENDIX B

EXCERPT FROM REPLY BRIEF OF BOSTON AND MAINE CORPORATION IN APPENDIX "G" PROCEEDINGS

APPENDIX B

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 21989

Finance Docket No. 21990

Joint Application of
THE PENNSYLVANIA RAILROAD COMPANY
and
THE NEW YORK CENTRAL RAILROAD COMPANY

REPLY BRIEF OF BOSTON AND MAINE CORPORATION UPON ISSUES I AND II OF THE REOPENED [APPENDIX G] PROCEEDINGS

[The following is an excerpt commencing at page 24 and continuing through page 27 of the above brief which was filed on February 6, 1967]

* * * *

N&W PLAN FOR DELAY

Section III of the N&W Opening Brief[52] is sharply critical of the Commission. Its basic contention is that Penn-Central consummation should not be permitted until

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[52] N&W Opening Brief, p. 43 et seq.

there is a Commission *finding* that B&M, EL and D&H can be included in a major rail system consistently with the public interest. In the brief's conclusion, N&W goes beyond that request and asks that consummation of Penn-Central be deferred until B&M et al. *are included* in a major system.

Plainly, N&W is asking that consummation of Penn-Central be deferred until final determination of its joint application with C&O for merger in F.D. No. 23832 et al., and until the subsequent inclusion of B&M et al. in the system thus formed. This is demonstrated by N&W claims that B&M inclusion in N&W itself in F.D. No. 21510 is impossible, and that B&M inclusion in Penn-Central will result in a New England rail monopoly.[53]

After outlining its position that the consummation of Penn-Central must be delayed until a final determination upon inclusion for the three protected lines, N&W chides the Commission for its "failure to face up to these questions," before authorizing Penn-Central to consummate.[54]

The present tactic of delaying Penn-Central by insisting upon a solution for B&M, D&H and EL which is contemporaneous with consummation of the Penn-Central merger comes with bad grace from N&W. In 1962, D&H, B&M and others argued in favor of consolidation, at least for purposes of decision, of the N&W-Nickel-Plate proceedings (F.D. No. 21510), the C&O-B&O control proceedings (F.D. No. 21160), and the Penn-Central merger case (F.D. No. 21989). At that time, the N&W proceeding was awaiting an examiner's report, the C&O-B&O control case was awaiting final consideration by the Commission, and the Penn-Central case was still in the hearing stage.

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[53] Id. at 48.

[54] Id. at 45.

With great vigor N&W opposed consolidation, even for purposes of decision. In a reply signed by John P. Fishwick, currently Senior Vice President of the N&W, to a D&H petition for consolidation, N&W stated:[55]

> "All of these petitions and the present petition of D&H Co. and D&H are attempts to have the Commission consider over-all plans for consolidation of railroads into a limited number of systems. But the Commission has long recognized that it has no authority under the Transportation Act of 1940 to require rail mergers to follow any predetermined plan. [Citing and quoting authority.]
>
> Under Section 5(2) of the Act, therefore, an applicant is entitled to have the Commission consider the proposed transaction on its merits and without regard to any preconceived plans for massive railroad unification.
>
> To consolidate (for decision or otherwise) these proceedings with the Pennsylvania-New York Central merger case and C&O-B&O proceeding would be to deny the applicants herein the right to have their proposals considered separately and on their own merits, as the statute requires."

Mr. Fishwick then added:[56]

> "Moreover, the period between the filing of an application with the Commission for unification authority and the consummation of the transaction is, at best, a difficult one for the involved railroads. During this "waiting period," it is often impossible to make firm decisions regarding assignment of personnel, with the result that undue prolonging of the final decision would seriously impair employee morale. This problem is compounded by the retirement of key officials and personnel, whose positions must be

[55] Reply Due September 20, 1962, pp. 4-5, F.D. No. 21510 et al.

[56] Id. at 6-7.

filled pending final action on proposed unification plans. It is, therefore, imperative from the point of view of employee morale and sound management practice not to postpone ultimate decision in the pending N&W unification proceedings any longer than is absolutely necessary.

Delay in the ultimate disposition of these proceedings would also make it difficult for the involved carriers to formulate sound plans for capital expenditures, especially purchase of new equipment, and for financing. Once the properties have been combined, increased efficiencies will obviate the need for considerable equipment which would otherwise be needed. If the interim period were to be prolonged, however, the involved carriers, in order to maintain their established standards of service, will be required to make sizable expenditures for equipment and other improvements which would not be needed after the unification."

At the oral argument on the proposed consolidation, Mr. Fishwick was even more explicit in his opposition to a delay in the N&W merger until a unified decision of all three of the principal pending merger cases could be accomplished by the Commission. He stated: [57]

"The Commission's sole role is to decide *whether such plans as submitted conform to the statutory standards which are in the public interest, and with such conditions as it might decide the public interest requires be imposed. We are, we think, entitled under the plain meaning of the statute to a prompt decision.* We cannot get such a prompt decision if we are to be held up while every railroad in the East, or New England, or in the entire country for that matter, which subsequently develops or proposes a unification plan of its own, submits it to the Com-

[57] Transcript of Oral Arguments before full Commission, October 24, 1962, p. 108, F.D. No. 21510 etc.

mission and then has it consolidated with ours." (Emphasis added.)

He also stated.[58]

> "As a practical matter, we have this problem: It is impossible to hold together in a state of suspension for a long period of time a financial plan as complex as ours involving as it does six separate railroad properties. As a practical matter, when, say, two railroads get together in a situation such as this the financial arrangements are based largely upon the recent past experience of each. They are used as a guide to what the future might hold, but as time passes the financial position of each of these component parts changes, and if these changes are substantial a deal which looked good in the beginning may prove to be less advantageous to one party than was expected. This is why railroads and their stockholders cannot be committed to any particular deal for long periods of time."

Mr. Fishwick spoke again of N&W's right to a prompt decision, reminding the Commissioners of their duty to make a decision whether to approve their merger or not,[59] and ended his argument with a plea to the Commission that "we think we are entitled to a decision now."[60]

Mr. Fishwick was successful in persuading the Commission not to resolve the problems of all the railroads in the Eastern District simultaneously. N&W, which is presently enjoying the results of its merger transaction with Nickel Plate, now asks this Commission to hold up the merger of the competitive Penn-Central System until the completion of the N&W-C&O-Dereco proceeding which will involve all the remaining railroads in the Eastern

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[58] Ibid.

[59] Id. at 114.

[60] Id. at 118.

District, and sees fit to criticize the Commission for its "failure to face up to these questions," involving the ultimate fate of B&M, D&H and others. It is hoped that the Commission will recognize that N&W has in effect argued both sides of the same issue in the same case, basing its argument upon what is expedient for it at the time.

There can be no doubt that the real basis for N&W's objections to the protective traffic conditions and the indemnity formula is to be found in its calculated program to hold up the Penn-Central merger while it pursues the N&W-C&O merger and enjoys the fruits of its earlier merger.

Nos. 778, 779, 830, 831, 832, 833, 834, 835 and 836

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

OSCAR GRUSS & SON, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *Appellant*,

v.

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ERIE-LACKAWANNA RAILROAD COMPANY, et al., *Appellants*,

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BOSTON AND MAINE CORPORATION, *Appellant*,

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READING COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

CITY OF SCRANTON, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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MOTION TO AFFIRM

Statement

These consolidated appeals attack the judgment entered by the three-judge district court for the Southern District of New York on October 19, 1967, dismissing complaints

and intervening complaints against the orders of the Inter state Commerce Commission ("Commission") in Finance Docket No. 21989, *et al., Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 328 I.C.C. 304 and 330 I.C.C. 328 (the *Merger* case), authorizing the merger of Pennsylvania Railroad Company ("Penn") and New York Central Railroad Company ("Central"), and in Finance Docket No. 21510, *et al., Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 330 I.C.C. 780 and 331 I.C.C. 22 (the *Inclusion* case), authorizing and directing the Norfolk & Western Railway Company ("N&W") to include in its system Erie-Lackawanna Railroad Company ("E-L"), The Delaware and Hudson Railroad Corporation ("D&H") and Boston and Maine Corporation ("B&M") on terms specified therein.

In the original report in Finance Docket No. 21510, 324 I.C.C. 1, the Commission in 1964 approved the merger of the New York, Chicago & St. Louis Railroad Company ("Nickel Plate") into the N&W and the acquisition by N&W through lease or stock control of certain other carriers. As one of the conditions to its approval of the N&W's proposals, the Commission retained jurisdiction for five years to permit E-L, D&H and B&M to file petitions for inclusion and to direct affiliation of the three roads with N&W upon equitable terms, if found consistent with the public interest. In September of 1965, E-L, D&H and B&M filed their petitions for inclusion.

In the original report approving the Penn-Central merger, 327 I.C.C. 475, the Commission imposed traffic and indemnity conditions—the so-called Appendix G conditions—for the protection of E-L, D&H and B&M until those three roads could be included in the N&W system or, possibly, the Penn-Central system. However, in its report on reconsideration, 328 I.C.C. 304, the Commission rescinded the indemnity provisions and assigned the indemnity and traffic conditions for further hearing, along with the ques

tion of a possible capital loss indemnification provision, but decided that consummation of the Penn-Central merger should not be held up pending final decision on the protective conditions.

Upon appeals by various parties attacking the *Merger* order, the three-judge court for the Southern District of New York, with Judge Weinfeld dissenting, denied a temporary injunction in *Erie-Lackawanna Railroad Co.* v. *United States,* 259 F. Supp. 964, but was subsequently reversed by this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372. The Court stated (at p. 378):

> "We hold only that under the uncontradicted findings of the Commission it was necessary for it to conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger."

After remand, the Commission issued supplemental reports and orders in the *Merger* and *Inclusion* cases, both decided June 9 and served June 12, 1967. In the *Merger* case, the Commission modified and reinstituted Appendix G protective conditions which are very favorable to E-L, D&H and B&M, found that no need was shown for any capital loss indemnification condition, and authorized prompt consummation of the Penn-Central merger. In the *Inclusion* proceedings, the Commission authorized and directed N&W to acquire stock control of E-L, D&H and B&M on specified terms, giving N&W an option to acquire D&H's assets for cash instead of through an exchange of stock.

On appeals by various parties attacking the Commission's order in the *Merger* case, the district court by order entered July 3, 1967, enjoined consummation of the merger "pending the final determination of these actions by this Court and thereafter for such further time, if any, and to such extent and on such terms as this Court may then direct."

D&H[1] brought an action to review the Commission's order in the *Inclusion* case; B&M and four insurance companies[2] holding large amounts of E-L's bonds ("E-L Bondholders") intervened as plaintiffs and, on motion of the United States and the Commission, the court directed that N&W be joined as an involuntary plaintiff.[3]

After the filing of briefs and other pleadings and hearing, the district court on October 19, 1967, disposed of all the actions in a single opinion, dismissing all of the complaints and intervening complaints, except that of The Central Railroad Company of New Jersey ("CNJ") whose Trustees, while reserving the right to assert that the order of the Commission should contain protective conditions for the benefit of CNJ, stipulated that they will not assert in any court any claim that the Penn-Central merger should be delayed for any reason or that the Appendix G conditions in favor of other carriers should be set aside. The complaint of the City of Scranton ("Scranton") and Milton J. Shapp ("Shapp") was dismissed with prejudice for want of prosecution. The complaints of Oscar Gruss & Son[4] ("Gruss") and The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee ("NH Bondholders") were "dismissed without prejudice to any action plaintiffs may be advised to take

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[1] D&H's objections to the Commission's *Inclusion* order were satisfied in the subsequent report on reconsideration, decided August 10 and modified on September 1, 1967 (331 I.C.C. 22).

[2] John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, Aid Association for Lutherans and Woodmen of the World Life Insurance Society.

[3] N&W "does not raise before this Court the questions arising from the district court's . . . holdings on its joinder as an involuntary plaintiff and venue." (J. S. 779, p. 9.)

[4] Gruss' earlier complaint against the Commission's order in the *Merger* case was dismissed by the district court on the ground that Gruss had no standing to maintain it, *Oscar Gruss & Son* v. *United States*, 261 F. Supp. 386, but that order was vacated by this Court and the case remanded for further proceedings, 386 U. S. 776 (May 9, 1967).

with respect to any further order in F.D. No. 21989 relating to temporary assistance to the New Haven or the inclusion of the New Haven in Penn-Central."

The district court stayed enforcement of that portion of the Commission's order in the *Merger* case authorizing immediate consummation of the Penn-Central merger until 15 days after the date of its order, "and if within that period a notice of appeal to the Supreme Court is filed and an application for a further stay is made to that Court, until the determination of such application or other order of the Court or the Circuit Justice." The district court also stayed enforcement of the Commission's order in the *Inclusion* case with respect to N&W until 15 days from the date of its order, "and if within that period N&W files a notice of appeal to the Supreme Court of the United States and prosecutes said appeal in accordance with the rules of said Court, until the determination thereof."

Notices of appeal were filed within the 15-day period. Several applications for stay and motions to consolidate and accelerate were filed by various parties and were granted by this Court in a *per curiam* order on November 9, 1967.

Jurisdictional Statements attacking the district court's judgment with regard to the Commission's order in the *Merger* case have been filed by N&W and its allies, The Baltimore and Ohio Railroad Company ("B&O"), The Chesapeake and Ohio Railway Company ("C&O") and Western Maryland Railway Company ("WM") (No. 778); by Gruss (No. 830); by the NH Bondholders (No. 831); by E-L and D&H (No. 832); by the Reading Company ("Reading") (No. 834); and by Scranton and Shapp (No. 835).

The *Inclusion* order is attacked by N&W (No. 779); by B&M (No. 833); and by the E-L Bondholders (No. 836).

Of the three protected roads, B&M attacks the *Inclusion* order while defending the *Merger* order. E-L and D&H take the opposite position, defending the *Inclusion* order, while making a limited attack against the *Merger* order.

The United States, the Commission, the State of New York and several other parties are defending the district court's judgment as to both orders, while Penn and Central support the judgment with regard to the *Merger* order.

Summary of Argument

The district court was clearly correct in sustaining both orders. The Commission's order authorizing and permitting prompt consummation of the Penn-Central merger will make possible very substantial benefits to the carriers and the public which they serve and, unless the merger is further delayed, will result in preserving the essential passenger and freight services of the New Haven. Except for Scranton and Shapp, no one even suggests that the merger is not in the public interest. The Appendix G conditions adopted by the Commission are clearly lawful and will provide ample protection for E-L, D&H and B&M should any of those roads for any reason not be promptly included in the N&W system. The *Inclusion* order provides terms for the inclusion of the three roads in the N&W system which, based on the record, are clearly equitable to all parties involved.

N&W and its allies should no longer be permitted to delay consummation of the Penn-Central merger and prevent inclusion of E-L, D&H and B&M in the present N&W system merely to enhance their chances of securing Commission aproval of the proposed N&W-C&O-B&O affiliation which, it is now abundantly clear, has been their objective from the start.

ARGUMENT

I. Consummation of the Penn-Central Merger Should Be Permitted as Soon as Possible.

There is no real question that the Penn-Central merger will eventually become a reality and will make possible

large savings to the merged company and improved service to the shipping public. The principal immediate public benefit from the merger, however, is that it *may* result in the preservation of the essential passenger and freight services of the New Haven, which will become a part of the merged system *if* consummation of the merger is permitted before the New Haven ceases operations.

The New Haven will run out of cash necessary to keep operating by the end of December or shortly thereafter. Unless the Penn-Central merger is approved by the end of the year, there is every likelihood that the New Haven will be forced into liquidation. In staying consummation of the merger for only 15 days to permit the filing of notices of appeal, the district court stated that "we are unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed; indeed we believe we have no right to do so." (J. S. 778, B-70.)

None of the appellants advance any argument which could possibly justify a further delay in consummation of the Penn-Central merger and the resultant demise of the New Haven.

A. The Commission Has Complied With This Court's Mandate.

N&W and its allies, as well as E-L and D&H, contend that the Commission's June 9 order in the *Merger* case is in conflict with this Court's mandate in *Baltimore & Ohio R. Co.* v. *United States, supra.* The Court in its opinion last March made it clear that it was holding only that it was necessary for the Commission "to conclude the inclusion proceedings" and thus determine "the ultimate fate"

of E-L, D&H and B&M,[5] "prior to permitting consummation of the [Penn-Central] merger" (p. 378). The Court stated that if the order in the *Inclusion* proceedings "is favorable these three roads would be included in the N&W system, which has indicated its acquiescence to such a plan" (p. 383).

N&W, which has evidently withdrawn any "acquiescence" it had previously indicated to including the three roads, argues that since it appears that the B&M,[6] and possibly the D&H, may reject the inclusion terms, the Commission has not determined "the ultimate fate" of all three of the roads and thus has not complied with the Court's mandate. This argument could have merit only if one assumes that the Supreme Court was not aware of the extent of the Commission's authority under section 5(2) of the Interstate Commerce Act and was requiring the Commission to do more than it had the power to do.

If any one of the three roads decides that it prefers to remain independent, as B&M may, and to take its chances on negotiating a more favorable voluntary affiliation at some later date, there is nothing the Commission can do to force it into the N&W system. All that the Commission could do is open the door for the three roads to join the N&W system, and this it has done. It cannot force them to take advantage of the opportunity.

Since N&W—because it had consummated its merger with the Nickel Plate and the other transactions authorized by

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[5] While E-L and D&H had urged this Court to delay consummation of the Penn-Central merger, B&M then supported and still favors prompt consummation of the merger.

[6] B&M is attacking the Commission's order in the *Inclusion* case because of its dissatisfaction with the terms prescribed for its inclusion. If its attack fails, it may well decide to accept the prescribed inclusion terms rather than go it alone or may receive a better offer from the N&W, which wants to keep B&M out of the Penn-Central system, so that there is no certainty that B&M will not be included in the N&W system.

the Commission in 1964—has bound itself to include the three protected roads upon equitable terms if so directed by the Commission, and the three roads were petitioning for inclusion in the N&W system, the Court naturally assumed that the granting of the petitions would determine "the ultimate fate" of the three roads. All that the Court could reasonably have required the Commission to do was determine their ultimate fate insofar as it had the power to do so in the *Inclusion* proceedings, and this the Commission has done in compliance with the Court's mandate.

In a slightly different vein, N&W contends that if "the *Inclusion* order is reversed by this Court, no valid determination of the ultimate fate of the protected roads will have been made, and, in that event, the mandate of this Court will in no sense have been satisfied" (J. S. 778, p. 12). Here, N&W seems to concede that if the Commission's *Inclusion* order is sustained, it constitutes a valid determination of the ultimate fate of the three roads, even though one or more may not accept the prescribed inclusion terms.

N&W further argues that the Commission's order would have determined the fate of the three roads if it had foreclosed their entrance into the Penn-Central system (J. S. 778, p. 14). But B&M or B&M and D&H could still decide to remain independent. Moreover, such a ruling would obviously have been improper. Although affiliation of the three roads with N&W is preferable and clearly in the public interest, if this does not happen, the inclusion of one or more of the three roads in the Penn-Central system might, upon an appropriate record, also be found consistent with the public interest.

E-L and D&H contend that "it seems inconceivable and certainly not contemplated by this Court that the Penn-Central merger could be consummated without both a final resolution of the validity of the Appendix G conditions and a final resolution of the future of E-L and D&H." (J. S.

832, p. 8.) If by "final resolution," E-L and D&H mean actual inclusion in the N&W system, then their contention is clearly wrong. Although D&H's directors have voted unanimously to recommend that the stockholders accept the prescribed inclusion terms, D&H is still exploring other affiliation possibilities.

It seems clear that this Court never intended to give each of the three protected roads power to hold up the Penn-Central merger until such time as it is actually included in the N&W system pursuant to the Commission's order in the *Inclusion* case, or in the Penn-Central system following some future proceedings, or has irrevocably decided to remain independent. The court below correctly concluded that the "Commission has now done what the Supreme Court directed it to do." (J. S. 778, B-67.) Whether this Court intended to delay consummation of the Penn-Central merger only until the Commission had concluded the *Inclusion* proceedings or until judicial review of the Commission's order had been completed is now immaterial since the orders in both the *Merger* and the *Inclusion* cases are now before the Court. In either case, the Court's mandate has now been complied with.

B. There Is No Real Question as to the Merits of the Penn-Central Merger.

At the time the *Merger* case was before this Court a year ago, the merits of the merger were attacked only by Scranton and Shapp, who had taken very little part in the proceedings before the Commission. After the Commission's order of June 9, Scranton and Shapp moved in the district court to stay proceedings on their intervening complaints before the court or, in the alternative, to permit their dismissal without prejudice.[7] Their motions were denied,

[7] Scranton and Shapp are attacking the Commission's order in both the *Merger* and *Inclusion* cases in *Borough of Moosic* v. *United States* (No. 10054—Civil, M. D. Pa.). The Borough of Moosic was not a party to the previous proceedings before this Court. That action, we are informed, is scheduled for hearing on December 15.

but an extension of time was granted to file a supplemental complaint. Scranton and Shapp failed to file supplemental complaints or further briefs as directed by the court's orders and, upon motions by the United States, the Commission, Penn and Central, the district court dismissed their complaints with prejudice.

While the dismissal of the complaints for want of prosecution was clearly warranted, the court also passed on their merits, stating (J. S. 778, B-9 fn.):

> "'While we entertain no doubt of the sufficiency of this ground, we think it well to add that, apart from any question as to standing, we find no merit in the complaints of Shapp and the City of Scranton. Much of their objection was directed against the portion of the order permitting E-L, D&H and B&M to petition in certain eventualities for inclusion in Penn-Central, but these roads could not be included in Penn-Central except on a finding that such inclusion was in the public interest and this would be subject to judicial review. The criticism that the Commission did not give adequate weight to the improved earnings of PRR and NYC during the course of the merger proceedings has been shattered by the results for the first half of 1967. Beyond this the attacks simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission.''

Scranton and Shapp now contend that the district court erred in dismissing their complaints with prejudice and that the issues raised by them are substantial. Their appeal is clearly without merit.

They concede that the "question of dismissal with prejudice pursuant to 41(b) F. R. Civ. P. is one for the discretion of a court, and depends on the facts of a particular situation." (J. S. 835, p. 13.) In view of the urgent necessity for prompt final review of the *Merger* order,

the district court was clearly justified in its action and probably would have abused its discretion had it done otherwise.

As to the issues raised by Scranton and Shapp, it is clear that neither will suffer any harm as a result of the Penn-Central merger. The City of Scranton is not served by Penn or Central (J. S. 835, p. 14). Their fear that the merger will have a harmful impact upon the State of Pennsylvania and its citizens is not shared by the duly elected officials of that State, who do not oppose the merger. Finally, as a stockholder of Penn, Shapp will clearly benefit from, and not be harmed by, the merger.

Since none of the other appellants challenge the merits of the Penn-Central merger, there is no real question as to its merits before this Court.

C. The District Court Was Clearly Correct in Holding That the Appendix G Conditions Adopted by the Commission Were Lawful.

In the decision last March, this Court referred to the fact that a decision by the Commission in the *Inclusion* proceedings was expected by June 1967 and stated that "if it resulted in the future of the protected railroads being finally decided," then "there would be no occasion for the conditions of Appendix G being imposed" (386 U. S. at 390). Since the three protected roads were asking to be included in the N&W and the latter had indicated its acquiescence to such a plan, the Court's reasoning was obviously justified.

Before the Commission, however, N&W had made it clear that it would challenge any order by the Commission directing it to include the three roads, except as a condition to the Commission's approval of N&W's proposed merger with C&O-B&O, and there was some indication that the B&M might not accept the "fate" which the Commission had determined for it, at least not on the terms pre-

scribed by the Commission. Faced with the necessity for early consummation of the Penn-Central merger in order to save the New Haven, the Commission promptly concluded the *Inclusion* proceedings by authorizing and directing N&W to include the three roads and reaffirmed its approval of the Penn-Central merger with authority for prompt consummation, but—contrary to this Court's suggestion—also modified and reinstituted the Appendix G traffic and indemnity conditions. The Commission was clearly correct in doing so, and the district court correctly found nothing unlawful about the Appendix G conditions adopted by the Commission.

If, as we believe it should, this Court sustains the Commission's *Inclusion* order, it is at least theoretically possible that D&H and B&M will promptly approve the terms, as E-L has already done, and become parts of the N&W system at the same time that the Penn-Central merger is consummated. In that event, the Appendix G conditions would never become effective. If, however, the merger is consummated before the stockholders of D&H and B&M vote on the inclusion terms, as appears likely, then the prescribed Appendix G conditions will provide ample protection.

The strategy of N&W and its allies, of course, has been and still is to try to prevent consummation of the Penn-Central merger and inclusion of the three roads in the N&W system in the hope that it can eventually force the Commission into approving the N&W-C&O-B&O combination. Previously N&W had urged that the Penn-Central merger be held up because no protective conditions had been adopted and the Commission had not concluded the *Inclusion* proceedings. Now that the Commission has done both, N&W naturally urges delay in consummation of the Penn-Central merger because the Commission has prescribed protective conditions which it contends are unlawful, while attacking the terms of the *Inclusion* order.

As summarized in the opinion of the district court, N&W attacked the Appendix G conditions on the grounds "that the revenue indemnity conditions create a pooling agreement in defiance of § 5(1) of the Interstate Commerce Act; that they will unwarrantably injure the unprotected roads; and that there is no substantial evidence of the merger's being in the public interest so long as the Appendix G conditions remain in effect." The court below carefully considered and correctly found "these conditions without merit" (J. S. 778, B-10).

N&W argues here that the district court affirmed the Commission's *Merger* order on a ground entirely different from that relied upon by the Commission by upholding the Commission's order on the ground that the "Appendix G conditions take sufficient care of them [the protected roads] *while they work out their future*", while N&W claims the "Commission expressly predicated its order in the *Merger* case on the assumption that the *Inclusion* order would be accepted by all three of the protected railroads" (J. S. 778, p. 15). This argument is clearly without merit.

In the text of the revised Appendix G conditions (330 I.C.C. at 362), the "protective period" is defined to extend until inclusion of any one of the three protected railroads in the N&W, the Penn-Central system, "or any successor" to N&W (which would presumably even include an N&W-C&O-B&O system). The Commission clearly recognized the possibility that one or more of the three roads might not accept the inclusion terms and provided for that contingency in the revised Appendix G conditions.

No objection to the Appendix G traffic and indemnity conditions is voiced by Penn or Central or the protected roads, E-L, D&H and B&M. As finally framed by the Commission, they are ideally suited for their purpose and the district court was clearly correct in finding them to be lawful in all respects.

D. The Reading No Longer Seeks a Delay in Consummation of the Merger.

The Reading has long been considered a "family line" of the B&O, with some 38 percent of its stock being owned by the B&O and another 10 percent held by Otis & Co. being subject to a first refusal by C&O. Several of Reading's officers are former B&O employees or hold office jointly in both roads. Reading intervened in the Penn-Central proceedings in August 1962, but did not oppose the merger and sought no special protective conditions (J. S. 778, B-19). It was not until after the Commission's report and order in the *Merger* case in April of 1966 that Reading first sought to introduce evidence as to the alleged adverse effect of the Penn-Central merger upon it. Its previous inaction, Reading claims, was due to its belief that as a member of the C&O-B&O "family", it would soon be merged directly into that system. The Commission, while granting Reading leave to participate in the further hearing, as to the effect of the Appendix G conditions, denied its request to reopen the record to show general adverse effect of the merger, holding that the Reading was bound by its original concession that the effect of the merger transaction would be inconsequential. The district court correctly found that it could not "fault the Commission for this ruling." (J. S. 778, B-21.)

While no longer asking to have the merger postponed (J. S. 834, p. 4), Reading still seeks protective conditions similar to those in Appendix G, "pending Reading's inclusion in a major railroad system." With C&O-B&O controlling, or at least having the power to control, the Reading, it is already included in a major railroad system. But even assuming that C&O's control or power to control does not amount to "inclusion", Reading's appeal is still without merit. As the district court pointed out: "Administrative proceedings, especially of such complexity as this, would never end if parties remained free to take new

positions at any time and seek to support them with evidence that had been available all along" (J. S. 778, B-21).

In any event, even if this Court should find that Reading is entitled to a post-merger hearing to present evidence as to its need for Appendix G-type of protective conditions, prompt consummation of the merger should be permitted.

E. The District Court Correctly Held That It Was Not Necessary for the Commission to Reserve Jurisdiction to Impose a Capital Loss Indemnity.

In addition to re-examining the Appendix G conditions, the Commission during further hearings in the *Merger* case also considered whether to require Penn-Central to pay a capital loss indemnification for any decrease in the price payable by N&W to the three protected roads due to diversion of their traffic to Penn-Central.

Before the Commission, N&W and the three roads all urged the Commission *not* to impose any capital loss indemnity. The three protected roads contended that "the price paid for their lines should not be affected by the new Penn-Central competition," while N&W urged approval of the N&W-C&O "Dereco" proposal. (330 I.C.C. at 359.) The Commission did not impose any capital loss indemnity, referring to the fact that in the *Inclusion* case it found that the three roads "will experience no capital loss as a result of the Penn-Central merger." (330 I.C.C. at 360.)

The Commission did not reserve jurisdiction to impose such a condition and did not discuss the possibility of doing so in its report. Reservation of jurisdiction for this purpose was not requested by anyone, at least not specifically, until E-L filed a petition for reconsideration of the Commission's June 9 report and order in the *Merger* case, which petition was denied by the Commission by order dated September 8, 1967. The district court held that while it would not have disapproved a reservation of jurisdiction for this purpose, it would not direct the Commission to

amend its order to do so. (J. S. 788, B-17.) The district court was clearly correct.

E-L and D&H still contend (J. S. 832, pp. 8-11) that the Commission should have reserved jurisdiction to require a capital loss indemnification, but purely as a precaution against the possibility that this Court might not affirm the order in the *Inclusion* case. The Commission should not be directed to reserve jurisdiction for this purpose unless this Court decides that: (1) the price N&W is required to pay is too high; (2) the price is too high because of future diversion of traffic by Penn-Central from the three roads; (3) Penn-Central should be required to pay for any resultant diminution in the value of the three roads to N&W; and (4) the Commission has authority to impose such an indemnity, which it has never before done or even considered. Should the Court decide all four of these questions in the affirmative, and we believe it should not, then the Commission can be directed to amend its order in this respect, but the *Merger* order should otherwise be upheld and immediate consummation of the merger should be permitted.

F. The District Court Was Correct in Upholding the Commission's Decision Not to Require Inclusion of the New Haven as a Condition Precedent to Consummation of the Merger.

Gruss and the NH Bondholders are interested in getting the best possible price for their interests in the New Haven estate, whether from a sale of the assets to a merged Penn-Central system or through liquidation of the railroad. It is only in the light of this objective that their strange arguments make any sense.

If inclusion of the New Haven were made a condition precedent to consummation of the merger, as Gruss and the NH Bondholders urge, it would almost certainly result in the liquidation of the railroad, causing tremendous harm

to the public dependent upon its service and probably to the New Haven creditors as well.

As matters now stand, the New Haven can be included in the Penn-Central system only through transfer of its assets pursuant to the purchase agreement negotiated by Penn-Central, and the New Haven's Trustees. The purchase price under the agreement, approved by the Commission on November 16, will be the subject of litigation which is expected to take two or three years. The New Haven, however, will probably run out of cash necessary to keep operating within the next two months. Unless the New Haven receives sufficient additional cash in a hurry, it will have to cease operations.

Penn and Central are willing, upon consummation of their merger, to loan the New Haven cash up to an amount of $25 million over the next three years. By its order dated November 16 and served November 21, the Commission has required Penn and Central, upon consummation, to loan sufficient cash to the New Haven to keep it operating, pending the acquisition of its assets. Under the Commission's order, the merged system will also have to absorb a substantial part of the New Haven's losses during the interim period. But Penn and Central cannot be required to advance any cash to the New Haven until their merger has been effectuated. Unless the merger is consummated promptly, the New Haven's demise appears to be a certainty.

Thus, the arguments of Gruss and the NH Bondholders must be rejected, because if consummation of the merger is held up until the New Haven is included, the New Haven could never be included.

II. The District Court Was Correct in Sustaining the Commission's Order in the Inclusion Proceedings.

In the original report in the N&W-Nickel Plate proceedings (324 I.C.C. 1), the Commission, as a condition to its approval of the transactions proposed by N&W, retained jurisdiction in Appendix O to permit the filing of petitions for inclusion in the N&W system by E-L, D&H and B&M and, if the proposed affiliation "be found consistent with the public interest," to direct "the accomplishment thereof under such terms as may be found equitable to all parties involved." (324 I.C.C. at 148.)

As pointed out by the district court, no substantial attack was made below on the Commission's basic finding "that inclusion of E-L, D&H and B&M in the N&W system on proper terms is in the public interest." (J. S. 779, B-30.) N&W argued below (1) that the Commission should have considered the desirability of including the three roads in the proposed N&W-C&O-B&O system and (2) that it should have found that inclusion of any of the three roads in the Penn-Central system would not be in the public interest. The district court properly rejected these arguments because the first course would have frustrated the expeditious decision required herein and the second would have required a negative determination not within the issues in the *Inclusion* case.

As to the fairness of the terms prescribed by the Commission and approved by the court below, this matter will be covered by other appellees and will be dealt with herein only very briefly. The terms prescribed by the Commission are clearly equitable to all parties involved.

As they did below, N&W attacks the *Inclusion* order on several grounds, B&M claims the price fixed for it is too low, and the E-L Bondholders contend that the order will permit dilution of the security for their mortgages and impair or prevent payment of interest, particularly on income bonds.

A. Inclusion of the Three Roads in the N&W System Is Clearly in the Public Interest.

N&W's principal argument is based upon a misconstruction of § 5(2)(d)[8] of the Interstate Commerce Act (49 U.S.C. § 5(2)(d)). That section provides that the Commission may, upon petition by railroads requesting inclusion and upon a finding that such inclusion is consistent with the public interest, require as a prerequisite to its approval of a proposed transaction, the inclusion upon equitable terms of such other railroads in the territory involved. Before the Commission can require inclusion it must first find that such inclusion would be consistent with the public interest and then find equitable terms, as it has done here. As the Commission stated in its report, "before defining the terms of inclusion based on earnings, we have set out in detail below the considerations that compel the conclusion on this record that petitioners' immediate inclusion in the N&W system is clearly in the public interest." (330 I.C.C. at 789.) The Commission went on to "find that inclusion of petitioners is in the public interest, and that on this record equitable terms may be based on the parties' comparative earnings." (330 I.C.C. at 790.)

N&W argues that the inclusion terms are inequitable and therefore the Commission's finding as to consistency with the public interest must fall. Clearly this is not so. Without equitable terms the Commission cannot of course require inclusion, but its finding as to public interest is not dependent upon the fairness of the terms. As discussed by other appellees, the inclusion terms are equitable

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[8] "(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest."

to all parties involved, but even if this Court should find otherwise, the Commission's basic finding as to consistency with the public interest should not be disturbed and any remand should be only as to the inclusion terms.

B. The Commission Clearly Considered the Possibility That All Three Roads Might Not Be Included in the N&W System.

N&W's second contention is that there are no findings to support inclusion of E-L alone, or E-L and D&H without B&M. N&W argues: "Every finding in the Commission's report with respect to the public interest in inclusion and the financial terms, assumes the inclusion of all three railroads as a package." (J. S. 779, p. 15.)

Since all three roads had petitioned for inclusion and the inclusion of all three in the N&W system would clearly be in the public interest, the Commission naturally fixed an inclusion price for each of the three roads. At the same time, however, the Commission clearly recognized and provided for the possibility that one, two or even all three of the roads might not become a part of the N&W system. In Appendix F (330 I.C.C. 868), the Commission provided that if E-L rejected the inclusion terms, N&W would not be required to include D&H and B&M and if D&H were not included, N&W would not have to take in the B&M. It also provided that if the stockholders of any petitioner rejected the inclusion terms, that road's petition for inclusion in the Penn-Central system would be considered dismissed. Thus, while the Commission's report and order provided inclusion terms for each of the three roads, provision was also made for the contingency that one or more of the roads might not be included.

N&W's argument boils down to the idea that the Commission should have prescribed three sets of inclusion terms for E-L—one if only E-L is included, a second if E-L and D&H are included, and a third if all three roads are in-

cluded—and two sets of terms for D&H—one if B&M is also included and another if B&M is not. As the district court pointed out, "it would have been wholly impracticable for the Commission to ask E-L and D&H to go to their stockholders with purchase prices sliding downward in the event of adverse action by stockholders of other roads." The lower court was clearly correct in finding that the "Commission exercised the best over-all judgment it thought possible under the circumstances, and its valuations for E-L and D&H must be taken to have encompassed the possibility that all three roads might not enter their new home" (J.S. 779, B-61).

C. The Inclusion Price Prescribed for B&M Was Clearly Justified by the Record.

B&M's claim that it has been undervalued is based primarily on the argument that the Commission should not have adopted the testimony of its witness that the only savings which would result from its control by N&W would be those from consolidation of traffic solicitation forces. Although the district court confessed surprise that control savings would be as limited as B&M's witness estimated, the court pointed out that a party cannot normally object if an agency has awarded all that its witness has claimed (J.S. 779, B-54).

While the Commission evidently believed that control savings would exceed those claimed by B&M's witness, the district court correctly ruled it "was not bound to attempt to price these out into increased earnings without the aid of detailed evidence and B&M had not furnished this" (J.S. 779, B-55). The district court was also correct in holding that the Commission was not required to reopen the record because such evidence was furnished by an N&W witness in the N&W-C&O-B&O merger proceedings, since B&M had already had a fair opportunity to present its case, which is all that is required.

B&M now argues that it "had no duty to introduce evidence of the control savings which might be realized under every conceivable degree or variation of control the Commission might find N&W would exercise" (J.S. 833, pp. 16-19). Although it had no duty to do so, it cannot complain if the Commission based its findings as to inclusion terms on the only evidence as to control savings which it did introduce. As the district court put it, "if a carrier chooses to present its case on a basis more conservative than the facts would warrant, the Commission can take it at its word" (J.S. 779, B-54).

D. There Is No Evidence in the Record Which Would Have Justified Special Treatment for E-L Bondholders.

The E-L Bondholders' claim that the Commission should have imposed some sort of safeguard for their benefit is clearly without merit. They did not take part in the hearings before the Commission and did not even intervene until the last day for filing exceptions to Commissioner Webb's recommended report. As the district court pointed out, should N&W abuse its position and try to divert traffic and other benefits from New E-L to its own lines, the E-L Bondholders could bring appropriate court action.

The E-L Bondholders now "ask only that the Commission's reservation dealing with post-consummation relief be clarified for their protection." (J. S. 836, p. 13.) None of the arguments advanced by them, however, would justify a remand for this purpose.

The statute clearly permits acquisition of control through purchase of stock without assumption of existing bonded indebtedness. If the E-L Bondholders wanted special treatment, they should have developed a record and proposed specific suggestions. Having failed to do this, they cannot properly request a remand, and the district court was clearly correct in so holding.

III. Even if the Commission's Order in the Inclusion Case Should, for Some Reason, Be Remanded, the Order in the Merger Case Should Be Upheld and Prompt Consummation Permitted.

On the basis of the record before it, the Commission was clearly correct in finding that inclusion of E-L, D&H and B&M in the N&W system would be consistent with the public interest, and the terms prescribed by it are equitable to all parties involved. If, however, this Court should hold otherwise and remand the *Inclusion* order to the Commission, either because the price fixed for E-L or D&H is too high or that for B&M is too low, then the Commission's order in the *Merger* case should still be affirmed. The Appendix G conditions, to which neither the three protected roads nor Penn and Central raise any objection, would adequately protect E-L, D&H and B&M during the period of any further proceedings before the Commission.

As discussed above, no substantial question has been raised as to the merits of the Penn-Central merger and the need for its prompt consummation. Scranton and Shapp, the only ones challenging the merits, declined to prosecute their actions below and there is no evidence that either would be harmed by the merger. The appeal of E-L and D&H is purely precautionary, aimed at having the merger held up until E-L is actually included in the N&W system and D&H has secured an absolute right to be included, while exploring other affiliation possibilities. Gruss and the NH Bondholders seek merely to enhance their bargaining position *vis-a-vis* Penn-Central and to realize the best price possible for their interests, even if it means the cessation of the New Haven's essential operations; indeed, that may be their objective. N&W and its allies have no valid objections to the merger and seek a delay in its consummation only to improve their chances for Commission approval of the proposed N&W-C&O-B&O affiliation.

Thus, even if this Court should disagree with the district court and remand the *Inclusion* order to the Commission, the order in the *Merger* case should still be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Nos. 778, 779, 830, 831, 832, 833, 834, 835, and 836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
NORFOLK AND WESTERN RAILWAY COMPANY,
OSCAR GRUSS & SON,
NEW YORK, NEW HAVEN AND HARTFORD R.R. CO. FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
ERIE-LACKAWANNA RAILROAD COMPANY, *et al.*,
BOSTON AND MAINE CORPORATION,
READING COMPANY,
CITY OF SCRANTON, *et al.*,
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE DELAWARE AND HUDSON RAILROAD CORPORATION TO AFFIRM

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OCTOBER TERM, 1967

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BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE DELAWARE AND HUDSON RAILROAD CORPORATION TO AFFIRM

The Delaware and Hudson Railroad Corporation (D&H), appellee in Nos. 778, 779, 830, 831, 833, 834, 835 and 836, moves, in response to the Jurisdictional Statements filed therein, to affirm paragraph (3) of the judgment below, and in support thereof respectfully states the following:

PRELIMINARY STATEMENT

These appeals challenge in one or more aspects the judgment of a unanimous three-judge court in the Southern District of New York dismissing on the merits complaints

attacking the validity of decisions of the Interstate Commerce Commission (the Commission) (1) authorizing immediate consummation of the merger of The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) subject to specified terms and conditions, and (2) directing Norfolk and Western Railway Company (N&W) to include in its system D&H, Erie-Lackawanna Railroad Company (EL) and Boston and Maine Corporation (B&M) on specified terms and conditions. The first case is referred to as the Penn-Central *Merger* case and the second as the N&W *Inclusion* case. These appeals, together with No. 832 in which EL and D&H are appellants on a conditional basis for the reasons stated in the Jurisdictional Statement therein, have been consolidated by order of this Court dated November 9, 1967.

On March 27 of this year, this Court held that prior orders of the Commission authorizing immediate consummation of the Penn-Central merger were patently invalid because the Commission had removed certain provisions of the "Appendix G" protection provided for D&H, EL and B&M which were a necessary prerequisite to the merger. *Baltimore & O. R. Co.* v. *United States*, 386 U. S. 372. The Court further held that consummation of the Penn-Central merger should be deferred until the future of D&H, EL and B&M and their inclusion in a major system had been decided, referring to the N&W *Inclusion* case which was then pending before the Commission as possibly dispositive of this matter. The Commission has since provided for such inclusion in the N&W system* (330 I.C.C. 780, modified on

* Pursuant to the conditions of Appendix O in the earlier report of the Commission in the N&W-Nickel Plate case, *Norfolk & W. Ry. Co. and New York C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 148 (1964), which conditions were established under the authority of Section 5(2)(d) of the Interstate Commerce Act, 49 U. S. C. §5(2)(d).

reconsideration, 331 I.C.C. 22) and its modified order has been upheld by the judgment which is here appealed from by N&W in No. 779, and by other parties in other appeals.* Since this Court's decision the Commission has also modified the Appendix G conditions in the Penn-Central *Merger* case and again authorized immediate consummation of that merger (330 I.C.C. 328). That order has also been upheld by the judgment which is here appealed from by N&W and its allies in No. 778, and by other parties in other appeals.**

D&H is concerned herein principally with the appeal of N&W in No. 779 relating to the N&W *Inclusion* case, although brief comment will also be made as to the other appeals. Paragraph (3) of the judgment below dismisses all complaints relating to the *Inclusion* case and D&H herein moves to affirm the same. If paragraph (3) is affirmed, D&H has no objection to affirmance of the lower court's judgment as it relates to the *Merger* case. If paragraph (3) is not affirmed on N&W's appeal in No. 779, then D&H, an appellant in No. 832, seeks remand of the *Merger* case on the grounds set forth in the Jurisdictional Statement in No. 832.***

N&W's Jurisdictional Statement in the *Inclusion* case lists seven questions presented. However, in discussing the alleged substantiality of these questions, N&W in fact confines itself to two issues. We will therefore here deal with these two issues, leaving our answer as to other matters to the brief of D&H of September 25, 1967 filed below in the *Inclusion* case, 67 Civ. 2451, and the opinion of the District Court.

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* Nos. 833 and 836.

** Nos. 830, 831, 834 and 835.

*** See also D&H's Motion to Consolidate, etc. filed herein November 6, 1967, pp. 6-8.

ARGUMENT

I. Concerning N&W's Appeal in the N&W Inclusion Case

A. The Commission Has Found, and Properly Found, That the Public Interest Would Be Served by Directing N&W to Acquire EL, D&H and B&M on the Terms Established

N&W seeks to impart an appearance of public interest to its position in the *Inclusion* case by charging (J. S. p. 10)* that "The Commission has not found that any public interest would be served by directing N&W to acquire the stock of deficit railroads." Thus N&W assumes a Commission finding, or that the evidence necessitates a finding, that D&H, EL and B&M would be "deficit railroads" when included in the N&W system.** As we shall show, this is clearly an erroneous assumption.

In fact, N&W's attack on the public interest aspect of the *Inclusion* case is spurious in the extreme. The Commission has been faced in a number of cases with the growing need for railroad consolidation in the East (330 I.C.C. at 784-89). Its provision for inclusion of EL, D&H and B&M in the N&W system stems from the Commission's findings, on the one hand, that a Penn-Central merger would provide vast benefits to the public at large in improved service, and the desirability, on the other hand, of preserving rail

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* Unless otherwise indicated, "J. S." refers to the Jurisdictional Statement in No. 779. All references to evidence, briefs and the like, unless otherwise indicated, are to the *Inclusion* case, either before the Commission or the District Court as will appear from the context. The opinion of the District Court is printed as Appendix B to the Jurisdictional Statements in both No. 778 and No. 779.

** N&W admits that after inclusion D&H would have substantial earning power but lumps D&H with EL and B&M in its claim that the three "collectively" would be deficit roads (J. S. p. 12).

competition in the territory that would be served by a Penn-Central system. Thus the Commission has concluded that EL, D&H and B&M, which would provide the only substantial competition with Penn-Central in the area east of Buffalo, but which it found unlikely to survive the competition of a Penn-Central combine as independent carriers (*Merger* case, 327 I.C.C. at 532), should be included in another system. It was logical to conclude that such other system should be N&W, which today has no lines east of Buffalo and which, after the inclusions, would thus be extended to the New York City area, northern New York and Montreal and into New England in direct competition with the lines of Penn-Central (330 I.C.C. at 792). The Commission recognized the responsibility of N&W to include these three roads when in 1964 it approved N&W's merger with the Nickel Plate and related acquisitions subject to a condition looking to such inclusion if Penn-Central should later be approved (324 I.C.C. at 30-32); and the Commission was clearly justified in insisting in the instant proceeding upon acceptance of this responsibility by N&W which had shown it could achieve annually $29,000,000 of savings in costs of operations through its 1964 unification with Nickel Plate and other roads (330 I.C.C. at 801). Further, it was this very N&W-Nickel Plate unification, along with that of Chesapeake & Ohio and Baltimore & Ohio, which gave impetus to the Penn-Central merger (*Merger* case, 327 I.C.C. at 519) which in turn created the necessity for making satisfactory provision for EL, D&H and B&M. The Commission has properly construed the Interstate Commerce Act as requiring strong roads to take care of weaker roads in consolidations that have territory-wide repercussions (330 I.C.C. at 789).

Moreover, the Commission has specifically found that "the normal earnings of each petitioner [EL, D&H and B&M] after inclusion will be sufficient to meet their fixed charges" (330 I.C.C. at 795). That recent earnings of the carriers as independent roads, to which N&W refers (J. S. p. 6), have not been as high as the Commission has found they would normally be after inclusion in no way detracts from this basic finding of the Commission. Far from merely "assuming", as N&W asserts (J. S. p. 14), that their inclusion in N&W would provide earning power for each of the three included roads as subsidiaries of N&W at least sufficient to meet its fixed charges, the Commission has detailed at length the reasons why it has arrived at this finding (330 I.C.C. at 794-95, 803-09, 813-18 (as modified by 331 I.C.C. at 28-31), 820-21).

Thus it cannot be denied that the Commission has found after weighing the evidence that none of the three petitioners would be a deficit railroad when included in the N&W system. And this finding has been reviewed in detail and upheld by the District Court as a rational finding supported by substantial evidence in every aspect challenged by N&W (J. S. B-33-61). The fact that the District Court considered N&W's contentions in the context of the issue as to fair terms rather than as a challenge by N&W on the issue of public interest in no way lessens the force of that Court's conclusion (e.g., J. S. B-40-42, 49) that the Commission's findings as to normal earnings are supported by substantial evidence. Rather, the Court's treatment of the matter is a proper recognition of the palpable fact that N&W's stated concern as to the public interest in being required to include the three roads has been merely a cover for its strenuous efforts to cut the price it should be required to pay for the petitioners.

Furthermore, even if the Commission had not found that normal earnings of each petitioner would be sufficient to meet its fixed charges, or, even if its finding as to normal earnings after inclusion lacked substantial evidentiary basis, N&W's argument would be without merit. N&W contends (J. S. p. 12) that unless each petitioner has sufficient earnings to make it a "viable" subsidiary of N&W, inclusion would not preserve its service. This contention overlooks the fact that the benefit to N&W itself of such inclusion may be sufficient to assure that N&W will preserve the service performed by wholly-owned or virtually wholly-owned subsidiaries* even if the individual earnings of one or more of them is a red figure. The advantages of protecting N&W's own traffic and revenues against the inroads of a Penn-Central system, to which the Commission has pointed (330 I.C.C. at 804-08), and the assistance of the petitioners to N&W in developing new business in competition with Penn-Central and other modes of transport, which the Commission has particularly stressed (*id.*), are sufficient to justify the conclusion that when included in the N&W system, continuance of the service of the petitioners will be assured. Likewise, the very substantial tax benefits to N&W of including EL, which N&W concedes (J. S. p. 11), furnish a further basis for the conclusion that N&W will keep EL as a subsidiary and preserve its service

*For five years, or possibly less, the subsidiaries will be over 80% owned by N&W (with its attendant consolidated return tax benefits), and thereafter they will be 100%-owned by N&W (331 I.C.C. at 44-45). The subsidiaries permitted to go into bankruptcy which are cited by N&W (J. S. p. 12, n. 5) were railroads of which a bare majority of the stock was owned, i.e., 56% in *Erie R. Co. Reorganization*, 239 I.C.C. 653, 655 (1940), and 51% (including indirect holdings) in the case of Central Railroad Company of New Jersey (see *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 684, 707-08 (1967)).

even if that subsidiary could not stand entirely on its own earnings.

In this connection there should be noted the evidence N&W itself offered to the Commission in the *Inclusion* case in support of its much touted N&W-C&O-Dereco "alternative." Such evidence (stricken by the hearing officer) was tendered to show that the large combination of N&W-C&O-Dereco would have greater *combined* traffic strength to compete with Penn-Central and greater *aggregate* savings in the cost of operation than an N&W system expanded to include merely the petitioners (e.g., Exs. N&W-4, pp. 61-65, N&W-8, pp. 18-23); but there was *no* evidence offered to show that each individual Dereco line* would have, to use N&W's words, "sufficient earnings to make it a viable subsidiary of N&W" (J. S. p. 12). Clearly the assurance of continuation of the subsidiaries as parts of the N&W system depends, as N&W recognized in its evidence, not merely on each subsidiary's earnings, or their combined earnings, but upon the *worth* of those subsidiaries to the system as a whole.

Here the Commission has not only found the worth of the petitioners on inclusion to be substantial in respect of increased competitive strength, protection against traffic losses to Penn-Central and tax benefits, but it has also found, after analysis in depth, that the normal earnings of each individual petitioner as a subsidiary of N&W would in fact be sufficient to cover its own fixed charges. The Commission has correctly concluded that there would be practical assurance of preservation of the service and competition of the three petitioning roads, after consummation of Penn-Central, if they are wholly-owned subsidiaries of N&W. The finding of the Commission that inclusion would

* N&W proposes merger of C&O with itself but each of the "Dereco" lines—D&H, EL, B&M, Reading and Central Railroad of New Jersey—would be operated as a separate subsidiary.

be consistent with the public interest is sound and N&W's attack thereon is totally lacking in substance.

B. The Commission Has Made Findings, Based on Substantial Evidence, Which Support Inclusion of D&H Without B&M on the Terms Established

N&W errs in asserting (J. S. p. 14) that the Commission's order assumes inclusion of all three petitioners.

The Commission has provided (331 I.C.C. at 43-47) that EL is to be included in the N&W system on the terms it has fixed whether or not D&H and B&M are included; and while it has provided that D&H cannot be included unless EL is included, it has also provided for D&H inclusion on the terms fixed whether or not B&M is included. The Commission expressly disavowed N&W's argument that the "inclusion of all three petitioners explicitly premises our decision herein" (*id.* at 41). Thus the Commission's order necessarily includes a finding, as the District Court said (J. S. B-59, n. 38, B-61), that the possible non-inclusion of B&M would not affect the terms for either EL or D&H; and the same is true as to the terms for EL if D&H is not included. We shall here concern ourselves with respect to N&W's contention only as it attacks the terms for D&H inclusion, assuming that EL will deal in its argument with N&W's contention as it relates to EL's terms.

It is clear that there are two reasons why the terms which have been established for D&H inclusion do not vary, depending on whether B&M is or is not included. One is that the evidence on the basic issue here involved supports the fairness to N&W of the prescribed terms even if B&M is not included. The second is that the Commission has conservatively required in addition significant "cushions" in the price established in order to protect the investment of N&W (330 I.C.C. at 801).

The basic issue as to the price which N&W should be required to pay for each petitioner concerns changes in the routing by shippers of freight traffic which may be reasonably anticipated as a result of inclusion of the petitioners in the N&W system, on the one hand, and the consummation of the Penn-Central merger, on the other. Obviously this is a matter peculiarly within the expertise of the regulatory agency.

The Commission has found (330 I.C.C. at 804-08) and the District Court has upheld its findings (J. S. B-42-49) in two major respects: (1) that inclusion of petitioners in the N&W system would increase freight revenues for petitioners on existing traffic of petitioners and N&W through solicitation for the long haul over the unified N&W system; and (2) that while petitioners would also suffer substantial losses of their existing traffic to a Penn-Central system, such losses would be fully offset by a combination of three elements, namely, (a) additional freight revenues for N&W itself on the existing traffic of petitioners obtained through routings thereof over the longer hauls of the thus-expanded N&W system, (b) protection to a substantial degree of N&W's existing traffic from loss thereof to Penn-Central, and (c), what the Commission regards as perhaps the most important of all, gains for N&W of *new* traffic, at the expense of Penn-Central or competing modes of transport, which inclusion of petitioners would permit through the expansion of the present N&W system and its increased competitive strength.

The evidence of record before the Commission as to these factors consists not only of evidence on the assumption of the inclusion of all three petitioners but also evidence on the assumption of the inclusion of less than all. Thus there

is evidence as to significant traffic gains for each of the components of an N&W-EL-D&H combination as a result of D&H inclusion, whether or not B&M is included.* There is furthermore shown to be substantial traffic protection against losses of N&W's existing traffic as a result of D&H inclusion, whether or not B&M is included. And, of course, the addition of D&H to an N&W-EL system (without B&M) would provide added competitive strength for obtaining new business, bringing such a system not only to the area served directly by D&H but also to the gateways to central and northern New England and eastern Canada (330 I.C.C. at 793-94). Significantly, by reason of the physical relationships of the roads involved (*id.*), new business which inclusion of D&H would generate would redound not only to the benefit of the present N&W but also in large part to its EL subsidiary, 93% of the stock of which the present N&W stockholders would own after EL's inclusion. The evidence is summarized in D&H's brief to the District Court dated September 25, 1967, pages 17-19.

Furthermore, on top of these offsets to losses of traffic to Penn-Central, there are "cushions" to protect N&W's investment if it acquires D&H (in addition to EL) without also acquiring B&M, notably substantial savings in operating costs not credited to D&H in the Commission's cal-

* It is to be noted that, at N&W's request (331 I.C.C. at 26), N&W is entitled to acquire D&H for cash, rather than for N&W common stock. Under the cash alternative D&H is given no credit in the calculation of the price for increases in D&H's own traffic (*id.* at 29-31). Also, as referred to in the following footnote, the price under the stock alternative likewise stands without any credit to D&H for increases in its own traffic. Thus all traffic gains to each of the components of an N&W-EL-D&H combination resulting from D&H inclusion must be taken into account in determining whether the losses of D&H traffic to a Penn-Central system would be offset after inclusion.

culation of the cash price N&W is required to pay for D&H,* and credit to N&W against the purchase price for a large portion of the income tax benefits which the law provides for D&H upon the sale of its assets to N&W at the loss resulting from the terms fixed by the Commission. See D&H's brief to the District Court dated September 25, 1967, page 19.

In this connection, N&W's criticism (J. S. pp. 23-24) of the District Court's treatment (J. S. B-60-61) of the savings in operating costs in apposition to losses of D&H traffic to Penn-Central if B&M is not included is obviously unjustified. The District Court had already noted (J. S. B-42-49) that the Commission had rationally concluded from the evidence that traffic gains after inclusion as well as protection of N&W traffic losses to Penn-Central would more than offset losses to Penn-Central if all petitioners were included. The Court had further noted (J. S. B-58-59) that although N&W, as custodian of the figures and knowledge, had the burden of presenting evidence that would permit a judgment as to the extent to which inclusion of

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* While the Commission has purported to credit D&H with 100% of the savings in operating costs and D&H traffic gains in its calculation of the price if N&W chooses to acquire D&H for N&W common stock, the dollar amount of such savings and gains required to support the price on the stock alternative ($339,000) is actually somewhat less than the $362,000 of savings (after income taxes) wholly apart from any traffic gains (see 331 I.C.C. at 33 and D&H's brief to the District Court, Sept. 25, 1967, p. 7, first footnote). Thus, even if it is considered that the gains in D&H's own traffic (as well as traffic gains for N&W and EL and protection against N&W traffic losses) must be taken into account in order fully to offset maximum D&H traffic losses to Penn-Central if B&M is not included, there remains on the stock alternative a small "cushion" in the savings. As indicated above, on the cash alternative, which N&W has insisted upon, the full amount of the savings constitutes a "cushion".

less than all petitioners would protect N&W against loss of its own traffic to Penn-Central, N&W had failed to do so; and the Court had already also pointed out (J. S. B-59) that in the absence of contrary evidence, the Commission was justified in concluding from the evidence before it that the losses of traffic of D&H and EL would not be a great deal larger if B&M were not included in N&W, but remained an independent carrier, than the losses would be if B&M were also included.

Thus when it said that the net effect of possible additional losses of D&H traffic if B&M is not included would be offset by the net effect of savings from control of D&H, the District Court was not giving, or implying that the Commission was giving, "credit" to D&H for the savings in the calculation of the cash price in conflict with the Commission's decision (331 I.C.C. at 29-31) not to give D&H such "credit". Rather, the Court was merely pointing out, as it said, that there were "still further considerations" supporting the Commission's action as to D&H, i.e., that this one "cushion" alone was sufficiently large to offset even the maximum of such additional losses in the event the Commission's conclusion as to traffic offsets should prove to be too optimistic. But, as the evidence of record shows (D&H brief below, pp. 17-19), the offset exists apart from this "cushion", and thus the "cushion", as the word implies, serves merely to confirm the fairness to N&W and the conservatism of the price established for D&H even if B&M if not included.*

*N&W attacks (J. S. pp. 23-24) the District Court's statement as to the $565,000 of control savings in three respects, the third of which is dealt with in the text hereof. As to the others, it is obvious that the Court was not disagreeing with the Commission as to the amount of the savings but was merely, and correctly,

It was, of course, highly desirable that the Commission establish one price for inclusion of each petitioner whether or not all were included. The Court below noted (J. S. B-61) that "it would have been wholly impracticable for the Commission to ask E-L and D&H to go to their stockholders with purchase prices sliding downward in the event of adverse action by stockholders of other roads." As the Court then added:

> "The Commission exercised the best over-all judgment it thought possible under the circumstances, and its valuation for E-L and D&H must be taken to have encompassed the possibility that all three roads might not enter their new home."

In sum, the evidence clearly supports the fairness to N&W of the terms for including D&H prescribed by the Commission even if B&M rejects the terms for its inclusion and B&M therefore chooses to remain an independent carrier for some indefinite period of time.

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noting the conservatism of the amount of savings estimated to be achievable if D&H is acquired by N&W. See J. S. B-54-55; see also Commissioner Webb's Recommended Report, pp. 129-30, indicating that even if EL is not merged, D&H can be merged into N&W, and that if this were done, N&W admits it could achieve over $3 million of savings a year in addition to the $565,000 of savings achievable if D&H were operated as a subsidiary. The full Commission's conclusion that merger now is "nowhere in sight" does not detract from the fact that the amount of savings used by the Commission is now and will prove ultimately to be on the low side. In view of N&W's questioning of virtually every other figure in the record, its unhesitating acceptance from the beginning of this proceeding of $565,000 as the amount of savings achievable on acquisition of control of D&H (see Ex. N&W-7, p. 8, App. 3, sh. 2, item 11) is itself a guarantee that the figure is conservative. See also the Jurisdictional Statement in No. 833, where B&M shows in detail the conservatism of the savings from control of subsidiaries relied on by the Commission.

Essentially N&W's position as to the effects of non-inclusion of B&M rests on N&W's assumption that if B&M stockholders reject the terms for inclusion in N&W, B&M will immediately seek to become, and will succeed in becoming, a part of the Penn-Central system (J. S. pp. 19-21). The facts do not bear this out.

While B&M has been classed by the Commission along with D&H and EL as in need of inclusion in a major system if the Penn-Central merger is consummated (*Merger* case, 327 I.C.C. at 532), B&M (a) has since advised the lower court that the adverse effects on B&M of that merger would be "undoubtedly less" than the adverse effects on EL and D&H (transcript of oral argument on previous review in the *Merger* case, Sept. 21, 1966, p. 63), (b) refrained last year from seeking in this Court a deferral of the Penn-Central merger even when the Commission had not provided for revenue indemnity protection for B&M, and now affirmatively supports consummation of the Penn-Central merger prior to assurance of inclusion in N&W or any other system (J. S. No. 833, p. 20), and (c) seeks denial of its own petition for inclusion in N&W if the terms fixed therefor by the Commission are not substantially improved (*id.* at 19) while aware of the Commission's firm conviction that from the standpoint of the public interest B&M's inclusion in N&W, along with that of EL and D&H, is preferable to inclusion in Penn-Central (330 I.C.C. at 796).

It seems to follow from the foregoing that B&M will not necessarily seek immediate inclusion in Penn-Central if its stockholders reject inclusion in N&W on the present terms. Rather, it appears clear that B&M believes that a Penn-Central merger will not impede B&M's ability to survive

as an independent carrier for a reasonable period of time;* and B&M evidently hopes that during the interval before its own inclusion in a large system becomes necessary, N&W's obdurate opposition to inclusion of B&M in the N&W system on terms that may be acceptable to B&M's stockholders will fade once N&W is forced to compete with a consummated Penn-Central system. See the September 14, 1967 affidavit (p. 3) filed below in the Penn-Central *Merger* case, 66 Civ. 2860, by Richard J. Mulhern, B&M's President.

Furthermore, while B&M might try to become part of Penn-Central if B&M stockholders reject the N&W inclusion terms, B&M would not only have major hurdles to surmount in order to achieve this goal but N&W could by appropriate action secure adequate protection for its investment in D&H if B&M should make this attempt. The Commission has already provided that in the event B&M stockholders reject inclusion in N&W, B&M will have no right to compel inclusion in Penn-Central (331 I.C.C. at 44). With EL and D&H in the N&W system it would seem doubtful that Penn-Central would be willing voluntarily to agree upon terms for inclusion of B&M in the Penn-Central system that B&M stockholders would find any more acceptable than the terms for B&M's inclusion in N&W. For, even if Penn-Central did, there would be no assurance that the Commission would approve an application by Penn-Central to acquire B&M if EL and D&H were al-

* B&M's position is thus to be contrasted with that of D&H which, as shown in its briefs filed with this Court last year in *Baltimore & O. R. Co.* v. *United States, supra,* is concerned with the possibility of heavy losses of its traffic to Penn-Central promptly after consummation of Penn-Central if D&H remains an independent carrier.

ready in the N&W system since the Commission is firmly convinced that the inclusion of all three in N&W is preferable to their inclusion in Penn-Central.* There is consequently good reason to believe that if N&W then filed an application to acquire control of B&M, it would be approved by the Commission, even on terms below Penn-Central's price. And finally, it is to be noted, N&W has advised the Commission that so far as its own "private" interests are concerned, it would just as soon see both B&M and D&H in the Penn-Central system (oral argument before the Commission, Tr. 3897-98).** Therefore, in the unlikely event of a Commission disposition to approve a Penn-Central-B&M combine following inclusion of EL and D&H in the N&W system, it would seem probable that at N&W's request the Commission would require as a condition thereto Penn-Central's acquisition also from N&W of the D&H properties***—and, if N&W is right in saying (N&W Exceptions to Recommended Report, pp. 5-6) that D&H is worth more to Penn-Central than to N&W, this would, moreover, be at a profit to N&W. Clearly, therefore, N&W's investment in D&H on the present terms can be fully protected even if B&M and Penn-Central should seek to combine, assuming a rejection by B&M of the terms for B&M's inclusion in N&W now established.

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* See also Mr. Justice Brennan's concurring opinion in *Baltimore & O. R. Co.* v. *United States, supra,* 386 U. S. at 408-09.

** N&W's statement (J. S. No. 778, p. 25) that "Plainly, the inclusion of B&M, or both D&H and B&M, in Penn-Central would be harmful to every other railroad operating in the East" is thus misleading.

*** D&H agrees that when B&M is in fact included in any of the major systems under discussion, the D&H and B&M properties should be in the same system.

In view of the foregoing, it is evident that N&W's reliance on *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947), and *Labor Board* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965), is misplaced. The District Court was correct in stating, as above pointed out, that the Commission's ultimate conclusion as to the value of D&H clearly encompasses the possibility that B&M might not be included. As the District Court pointed out, the *Chenery* case does not require the agency and the courts to play "a nigh endless game of battledore and shuttlecock with respect to subsidiary findings." While the Commission did not *in haec verba* state that it found that the price for D&H should not vary depending on B&M's actual inclusion, it is clear that the Commission directly focused on the problem and determined that no difference in the price should be established. For the Commission fixed a value for D&H on inclusion in the N&W system with express awareness of the fact that B&M might not actually be included, and without making D&H inclusion dependent on B&M's inclusion although it expressly made B&M's inclusion dependent on that of D&H and the inclusion of both dependent on EL's inclusion; and the evidence fully supports such value as fair to N&W on the Commission's principles of valuation, whether or not B&M is included.

II. Concerning Appeals of Parties Other Than N&W in the N&W Inclusion Case

The Jurisdictional Statement of the EL bondholder appellants in No. 836 seeks remand only for what they contend is a necessary clarification which would not delay the inclusion of EL (on whose inclusion D&H inclusion in N&W is dependent) on the presently established terms. Assuming that such a remand would not delay EL's and

D&H's right to proceed to enforcement of the Commission's provision for their inclusion in N&W in its order in 330 I.C.C. 780, as modified, 331 I.C.C. 22, D&H takes no position as to the merits of the EL bondholders' appeal.

B&M in No. 833 seeks a remand either to consider evidence which may produce terms more favorable to B&M or, alternatively, to deny B&M's petition for inclusion in N&W. Since the Commission has found that D&H's inclusion in N&W on the terms prescribed for D&H is not dependent on B&M's inclusion, any remand based on either prong of B&M's appeal should also be without prejudice to the right of EL and D&H to proceed to enforcement of the Commission's provision for their inclusion in N&W in its order in 330 I.C.C. 780, as modified, 331 I.C.C. 22.

III. Concerning the Penn-Central Merger Case

For the reasons stated in the Jurisdictional Statement of EL and D&H in No. 832, appeals in the *Inclusion* case necessitate the deferral of consummation of Penn-Central until there is a final decision providing for D&H inclusion in N&W (or failing that, some other major system).

Further, for the reasons also stated in said Jurisdictional Statement, if this Court remands the *Inclusion* case on any ground relating to the consequences of a Penn-Central merger on the traffic of D&H or of EL, on whose inclusion in N&W, D&H inclusion is dependent, this Court should also remand the Penn-Central *Merger* case. Remand of the *Merger* case should be required under such circumstances because of the Commission's failure to retain jurisdiction to impose on the Penn-Central system a condition requiring that system to indemnify D&H or EL or both for capital loss in the event the Commission provides for inclusion in the N&W system on terms reflecting, because of

the traffic consequences of a Penn-Central merger, a downward adjustment in the price N&W would otherwise be required to pay.

The appeal of D&H and EL will become moot if the judgment below in the *Inclusion* case and as to the lawfulness of the Appendix G conditions in the *Merger* case is affirmed.

The Jurisdictional Statement of N&W and its allies (hereinafter collectively referred to as N&W) in No. 778 concerning the judgment as to the *Merger* case, to the extent N&W therein assumes affirmance of the *Inclusion* case, rests principally on one argument. N&W contends that the Appendix G conditions for the protection of EL, D&H and B&M pending inclusion may be of indefinite or even permanent duration because of the likelihood, as N&W sees it, of B&M's rejection of terms for inclusion in N&W and the possibility of D&H's rejection of N&W inclusion terms; and N&W says (J. S. No. 778, p. 16) that the Commission, expecting the three roads to become N&W affiliates, has not dealt with the possibility that a protected road might not become an N&W affiliate, might reject the inclusion order, or that Appendix G might have to be in effect "for a period far beyond the short interim that would have been necessary to handle the mechanics of inclusion."

N&W's charge that the Commission has not considered these matters is baseless. Its definition in the *Merger* case of the "protective period" for which Appendix G is to endure (330 I.C.C. at 362) explicitly contemplates rejection of the inclusion terms and provides for re-assessment of the matter of duration of protection if they are not accepted and the inclusion accomplished within one year after a final determination upholding the inclusion terms—the pos-

sibility of which is expressly recognized not only as to B&M and D&H, but also EL, in its simultaneous decision in the *Inclusion* case (330 I.C.C. at 868-69). The Commission furthermore has provided in its decision in the *Merger* case (330 I.C.C. at 355) for revocation in whole or in part of the Appendix G protection should it appear that the protected roads, because they cease to "expect to become affiliates of N&W" or for any other reason, endeavor to divert traffic from N&W to Penn-Central. The Commission also noted in this connection that if any protected road thus sought to divert traffic, it would assume the risk of retaliation from N&W.

The remainder of N&W's attack on the lawfulness of the Appendix G conditions is a repetition of its argument made below and should be rejected on the opinion of the District Court.*

Since the Jurisdictional Statement in Reading Company's appeal, No. 834, seeks only protection for Reading, stating (p. 4) that the relief sought "will not result in injustice to Penn-Central or to the other small railroads involved since Reading is not now seeking to have the merger postponed", D&H takes no position on the merits of Reading's appeal.

The appeal of the City of Scranton and Shapp, No. 835, should be dismissed as clearly lacking in substantiality and no further discussion thereof is here required.

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*As set forth in D&H's Motion to Consolidate, etc. herein of November 6, 1967, page 5, footnote, while Appendix G is lawful it would be inherently less protective of D&H against the adverse effects of Penn-Central than D&H inclusion.

D&H was not a party to the action of Oscar Gruss & Son or New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (whose complaints are discussed in the opinion below at B-22-30), and therefore takes no position with respect to their appeals, Nos. 830 and 831.

CONCLUSION

The judgment below as to the *Inclusion* case should be affirmed. If it is affirmed, D&H has no objection to affirmance of the judgment below as to the *Merger* case. If the judgment below as to the *Inclusion* case is reversed,* the judgment below as to the *Merger* case should also be reversed and the matter remanded to the Commission for further proceedings as herein set forth.

Respectfully submitted,

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November 27, 1967

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* Other than on the appeal of B&M or the EL bondholders assuming, as prayed above, any remand based thereon is without prejudice to the right of EL and D&H to proceed to immediate enforcement of the Commission's provision for their inclusion.

FILE
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JOHN F. DAVIS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 779 and 836

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM IN NOS. 779 AND 836 BY ERIE-LACKAWANNA RAILROAD COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant*, *v.* UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 779
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*, *Appellants*, *v.* UNITED STATES OF AMERICA, *et al.*, *Appellees.*	No. 836

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM IN NOS. 779 AND 836 BY ERIE-LACKAWANNA RAILROAD COMPANY

Appellee, Erie-Lackawanna Railroad Company (EL), moves to affirm the judgment of the district court in so far as it is challenged by the appeals of Norfolk and Western Railway Company (N&W) in No. 779 and of John Hancock Mutual Life Insurance Company, *et al.* (the EL Bondholders) in No. 836. Those appeals are taken from that portion of the final judgment of the three-judge court for the Southern District of New York entered on October 19, 1967, dismissing appellants' complaints. Their com-

plaints sought to enjoin and set aside an order of the Interstate Commerce Commission (the Commission) directing N&W to include EL, The Delaware and Hudson Railroad Corporation (D&H) and Boston and Maine Corporation (B&M) upon specified terms (the *Inclusion* case). The questions presented by those appeals are so unsubstantial as not to need further argument.

STATEMENT

Almost seven years ago EL first sought inclusion in the system which N&W was then seeking to create, and has since created, by its merger with The New York, Chicago and St. Louis Railroad Company (NKP), lease of the Wabash Railroad Company (Wabash) and other related transactions.* The Commission authorized those transactions on June 24, 1964. 324 I. C. C. 1. The N&W system was thus enabled to achieve $29 million of annual operating savings and to obtain more than $50 million of additional annual operating revenue. 330 I. C. C. 780, 801, 881.

At the outset of those proceedings, EL intervened in opposition to the proposed consolidation unless, pursuant to section 5(2)(d) of the Interstate Commerce Act, it were included as a part of the new system. However, on October 30, 1961, EL withdrew its opposition and its petition for inclusion pursuant to an agreement with N&W. 324 I. C. C. at 20-21. That agreement provided, among other things, that, after the merger of N&W and NKP was authorized, N&W would "forthwith, in good faith" enter into negotiations with EL in an attempt to agree upon a plan for some

*A fuller statement of the prior proceedings is set forth in our brief to the court below in the *Inclusion* case dated September 25, 1967, and furnished to the Court pursuant to its order of November 9, 1967. In supplementing this presentation we shall refer to that brief as "EL Brief Below."

form of inclusion of EL in the enlarged N&W system. Ex. EL-1, at 3.*

To allow full exploitation of that agreement "and to afford the fullest protection to the public interest," 324 I. C. C. at 28, the Commission, pursuant to its authority under section 5(2)(d) to require, "upon equitable terms, inclusion of another railroad or other railroads in the territory involved," conditioned its approval of the N&W-NKP-Wabash unification upon the following provisions in Appendix O to its report:

> "1. For a period of 5 years following the date of the order herein the Commission will retain jurisdiction to permit the filing of petitions by the Erie-Lackawanna Railroad Company, The Delaware and Hudson Railroad Corporation, and the Boston and Maine Railroad for inclusion in the Norfolk & Western system. Upon the filing of such petition or petitions, the attendant facts and circumstances will be appraised upon the basis of an appropriate record or records then to be compiled, and if the affiliation or affiliations then sought, or some reasonable modification thereof, be found consistent with the public interest, the Commission will direct the accomplishment thereof under such terms as may be found equitable to all parties involved. It is not intended that acceptance of this condition by applicants herein will foreclose or limit review of any decision of the Commission disposing of a petition filed pursuant to this condition.

*The statements and exhibits offered by EL and N&W were identified in different ways. For convenience, all citations to prepared statements will include the name of the witness. EL statements will be cited with the number preceded by an "S". All other documents marked as exhibits, including N&W statements, will be cited with the number preceded by "Ex." All references to pages of the transcript of the hearings will be preceded by "Tr."

"2. . . .

"3. Consummation by the applicants of any transaction approved herein shall constitute on the part of such applicants acquiescence in and irrevocable assent to the conditions stated in this appendix." 324 I. C. C. at 148.

Thus, by consummating the merger with NKP and the related transactions, N&W irrevocably assented to the conditions in Appendix O and became obligated under its contract with EL.

N&W was aware of the advantages and disadvantages of an affiliation with EL when it entered into the agreement with EL and when it irrevocably assented to the conditions of Appendix O. Tr. 1313-14 [Fishwick, N&W Senior Vice President]; EL S-4, Moonshower, at 1-3. However, despite the efforts of EL to negotiate with N&W after the NKP merger, N&W simply refused to enter into any meaningful discussions with EL. EL S-1, Fuller at 15-18; Tr. 1310-11 [Fishwick].

Because of EL's dramatically improving financial condition, EL had every reason to believe that a satisfactory form of affiliation with N&W could be agreed to. That turnaround was characterized by an outstanding railroad expert as "one of the most sensational rehabilitations of railroad earning power ever accomplished in this country," and that judgment was adopted by the Commission. 330 I. C. C. at 812-13. The reasons for that turnaround, engineered by new management obtained by EL in mid-1963, are set forth at length in the testimony submitted by EL, EL S-2, Maxwell, at 3-9, 13-36; EL S-7, Wyer, at 7-29, and in the Commission's report. 330 I. C. C. at 843-44. A summary of the

basic financial results involved demonstrates that turnaround.*

	1961	1963	1964	1965	1966	1965-66 Average
Railway Operating Revenues	$211.0	$206.0	$212.4	$230.0	$235.8	$232.9
Railway Operating Expenses	192.2	180.8	179.8	185.0	185.3	185.2
Income Available for Fixed Charges	(13.9)	(7.5)	1.7	14.7	18.5	16.6
Net Income after All Charges ...	(26.5)	(17.1)	(8.3)	3.3	6.7	5.0†

Source: 330 I. C. C. at 873 (all figures in millions).

However, all chance of negotiating an affiliation with N&W disappeared when, on August 31, 1965, N&W revealed to the public that it had negotiated a merger with The Chesapeake & Ohio Railway Company (C&O). EL S-1, Fuller, at 17-18. The projected N&W-C&O merger included a proposal—the so-called Dereco plan—to accept EL and four other smaller eastern railroads as subsidiaries

*The record was closed August 10, 1966. The Commission's decision dated June 9, 1967, considered all financial reports through the first quarter of 1967. 330 I. C. C. at 811-12 n.18. N&W repeatedly urges on the Court the more recent financial reports which were obviously not considered by the Commission. Those financial reports, like the reports of the other railroads in the eastern district and most of the railroads throughout the country, show a revenue decline for the first nine months of this year. They neither prove nor disprove the correctness of the Commission's projection. Nor is there any way of evaluating the significance of those reported figures from the record.

†The major adjustment made by the Commission in estimating EL's future contribution to the N&W system was to add to EL's average reported results during 1965-66 $4.5 million ($6.8 million less $2.3 million) representing additional commuter relief obtained from the State of New Jersey not reflected in 1965-66 results. 330 I. C. C. at 813-14.

of the merged system on specified terms. The day after the public announcement, N&W told EL that the terms of the Dereco plan were not negotiable but were "take it or leave it".* EL S-1, Fuller, at 18-19; Tr. 1568 [Pevler, N&W President].

The terms proposed by N&W were not fair to EL and not negotiable and the offer was conditioned upon a number of events beyond the control of EL and N&W, including Commission approval of an N&W-C&O merger. Therefore, on September 28, 1965, EL petitioned to reopen the N&W-NKP merger proceeding to hear and determine EL's application for immediate inclusion in N&W. Hearings were held before Commissioner Charles A. Webb between April 20 and August 10, 1966, and a recommended report and order was issued by Commissioner Webb on December 22, 1966. A final report and order was issued by the Commission dated June 9, 1967, 330 I. C. C. 780, followed by a supplemental report and order dated August 10, 1967. 331 I. C. C. 22. The principal findings and conclusions of the Commission with respect to EL are set forth at pages 14-16 of EL's Brief Below.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The EL Bondholders now claim to seek "protection of their vital interests." Jurisdictional Statement in No. 836, at 5. However, they have never stated what those vital

*N&W valued its 1965 offer to EL's stockholders at $43.4 million. Tr. 1288, 1623. Under the terms for inclusion set by the Commission, EL's stockholders will be given 648,777 shares of a nondividend-paying stock convertible into dividend-paying N&W common on a share-for-share basis at the end of five years. N&W common stock is currently selling at $91 per share. N. Y. Times, Nov. 25, 1967, at 60. Even if EL's stockholders were receiving N&W common directly, under the Commission's order they would receive only about $59 million (648,777 x $91). N&W's financial expert testified that nondividend-paying shares convertible into N&W common after five years would sell for 15% to 20% less than N&W common. Tr. 1656-58.

interests are, how they will or may be infringed or what, if anything, the Commission ought to do or ought to have done to protect them—except they now claim that the Commission ought now to retain jurisdiction to accord the EL Bondholders some relief from something in the future. Their present posture is consistent with their posture before the district court and their last-minute appearance before the Commission.* We note that the EL Bondholders do not seek delay in the inclusion of EL in the N&W system, *id.* at 3, and we are content to rely upon EL's Brief Below at pages 60-64 and the decision of the district court.

N&W presents seven questions. In essence, those questions were presented to and rejected by the court below. The EL Brief Below deals with the arguments presented there and repeated here. Since that brief is before this Court, we will not repeat our arguments.

The questions argued in N&W's Jurisdictional Statement in No. 779 (J. S. 779) are somewhat confusing. Thus, the first point in N&W's argument is "The Commission has not found that any public interest would be served by directing N&W to acquire the stock of deficit railroads." J. S. 779, at 10. That contention is quite true, and quite irrelevant, for the simple reason that the Commission has not directed N&W to acquire the stock of any railroad which it found to be a "deficit railroad."

Further, point 3 of N&W's argument curiously criticizes the district court for allegedly failing to follow the rule of *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947). The district court's statement that

> "... In *Massachusetts Trustees* v. *United States*, 377 U. S. 235, 248 (1964), the Court made plain that *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943), so

*The EL Bondholders did not participate in any way in the hearings before Commissioner Webb.

> heavily relied on by N & W, was intended only to establish the important point that a reviewing court could not affirm an agency on a principle the agency might not embrace—not to require the tedious process of administrative adjudication and judicial review to be needlessly dragged out while court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings." J. S. 779, at B-69.

and its treatment of the issues are consistent with this Court's two decisions in *Chenery*. Compare for example that statement of the district court with the statement of Mr. Justice Black, dissenting in the first *Chenery* case (and in the majority in the second *Chenery* case):

> ". . . A judicial requirement of circumstantially detailed findings as the price of court approval can bog the administrative power in a quagmire of minutiae. Hypercritical exactions as to findings can provide a handy but an almost invisible glideway enabling courts to pass 'from the narrow confines of law into the more spacious domain of policy.' *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 99 (1943).

Compare also this Court's first decision in *Chenery,* 318 U. S. 80, 87-88 (1943), with the statement of the court below criticized by N&W. The Court's summary of its first decision in *Chenery* in the opinion in the second *Chenery* case, 332 U. S. 194 (1947), relied on by N&W is not to the contrary.

In addition to relying on EL's Brief Below, we believe it may be useful to the Court if we attempt here briefly to point out two of the basic fallacies in the attack made by N&W on the decisions of the Commission and the court below.

I.

N&W'S ATTACK UPON THE COMMISSION'S DETERMINATION OF THE STOCK EXCHANGE RATIO FOR EL IS PREMISED UPON A FUNDAMENTAL MISCONCEPTION.

The illusion which N&W's basic argument seeks to create is that the Commission mechanically computed that EL would have net income of $9.6 million annually after inclusion in N&W and on that basis alone concluded that the prescribed exchange ratio was equitable. N&W thus would credit that $9.6 million figure with both a precision and a significance which it does not have.

EL's net income as projected by the Commission is not the product of a mathematical computation which, when compared with the projected earnings of N&W, produces the exchange ratio found to be equitable by the Commission. The projected net income for EL is a judgment by the Commission representing the resolution of many disputed questions concerning individual elements of value.* Some of those disputes were resolved in favor of EL and some were resolved in favor of N&W. As we shall show, the $9.6 million projection is most conservative. It reasonably could have been substantially higher.

Not only was the $9.6 million figure arrived at through the repeated application of judgment to a number of disputed issues, but its significance must be appraised in the proper context. The proper context includes: (1) the substantial discounting of the projected EL earnings made by the Commission in arriving at the prescribed exchange

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*"The valuation of railroad properties involves the application of informed judgment to many factors incapable of precise measurement. No mathematical formula is available; no scientific accuracy can be expected." *Pennsylvania R. R.—Merger—New York Central R. R.*, F. D. No. 21989, mimeo decision dated November 16, 1967, at 17.

ratio; and (2) the complete downside cushion of EL's earnings to which the Commission gave great weight, stating "even if EL earnings are not sufficient to support the proposed stock exchange ratios, N&W's investment is protected . . . [by] substantial tax benefits." 330 I. C. C. at 816.

As the district court pointed out, J. S. 779, at B-50, and as we described in EL's Brief Below at page 20, in projecting normal earnings for EL the Commission adjusted EL's actual 1965-66 earnings both up and down for a number of factors which were vigorously contested by both sides. Among the downward adjustments were $5.5 million of charges which cannot possibly occur for five years. 330 I. C. C. at 812, 845. Moreover, the Commission did not include in the $9.6 million projection the undisputed $1 million in annual tax savings that EL will contribute to N&W. *Id.* at 813-14, 846.

Having projected net income for EL in that conservative fashion, the Commission next calculated an exchange ratio of 0.172 of a share of N&W common stock for each share of EL stock. *Id.* at 815-16. However, the ratio set by the Commission was not 0.172 to 1 but 0.128 to 1—a reduction of 25%. In addition, the Commission, over EL's exception, further reduced the value of the exchange by providing that the exchange would not be EL stock for N&W stock but rather EL stock for stock of a new corporation (NC). 331 I. C. C. at 44-45. NC stock is convertible into N&W stock on a share-for-share basis after five years.* The Commission found that during those five years there is virtually no chance that EL stockholders will receive any dividends. 330 I. C. C. at 841-42. N&W's financial expert

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*Conversion may take place sooner if an amendment to the Internal Revenue Code first proposed in 1965, known as the Keogh Bill, is enacted.

testified that such shares would sell for 15 to 20 percent less than N&W common stock. Tr. 1656-58.

Moreover, the Commission did not justify the terms prescribed for EL solely in terms of its conservatively stated, sharply discounted judgment as to EL's future average net income as part of the N&W system. The Commission stated that "even if EL earnings are not sufficient to support the proposed stock exchange ratios, N&W's investment is protected . . . [by] substantial tax benefits." 330 I. C. C. at 816. N&W took no exception to the detailed findings in the recommended report on the tax benefits which EL will contribute. The Commission adopted Commissioner Webb's recommended findings *in toto*. *Ibid.* Those tax benefits are so large that they not only provide immediate significant benefits, *id.* at 846, but they also constitute a complete insurance policy to N&W for the investment it will make in EL. *Id.* at 847. Thus, as we demonstrated before the Commission and at pages 24-25 of EL's Brief Below, even if EL's future annual net income were zero, N&W would still recover its total investment through the tax benefits which N&W will obtain from the inclusion of EL.

N&W's feigned surprise at being told that it can, if necessary, "recoup the enforced purchase price from the United States Treasury," J. S. 779, at 11, comes with little grace at this late stage. The magnitude of EL's tax benefits have long been known to and, in fact, conceded by N&W. Indeed, those tax benefits were a major part of the motivation for the N&W-C&O merger proposal and the side offer to include EL. Exhibit EL-142 contains a secret memorandum* prepared by N&W's Senior Vice President and read by N&W's President to the N&W Board as the only support for management's recommendation of the N&W-

*The memorandum was not submitted by N&W but was obtained by EL from the record of an unrelated court proceeding.

C&O proposal. Tr. 1284-87, 1298. That memorandum reveals that acquisition of the so-called "Dereco" roads, of which EL is by far the largest, "would mean that for a number of years after the effective date of the affiliation, the N&W would have to pay little, if any, taxes." 330 I. C. C. at 847.*

In summary, as the district court stated, "we cannot emphasize too strongly that the Commission's exchange ratios represented an informed judgment on all elements of value rather than a mere mathematical calculation from some of them." J. S. 779, at B-50-51.

II.

THE COMMISSION HAS FOUND, AT LEAST TWICE, THAT EL SHOULD BE INCLUDED IN N&W ON THE PRESCRIBED TERMS EVEN IF D&H AND B&M ARE NOT INCLUDED.

N&W asserts that the Commission has made no finding with respect to whether EL alone should be included in N&W. Moreover, says N&W, if EL alone is included its value to N&W would be substantially reduced. N&W's first argument is flatly wrong, and its second is contrary to the evidence of record. Furthermore, both

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*The entire memorandum is reproduced as an Appendix to this motion. The important admission quoted above appears in the following context:

> ". . . Inclusion of these [five Dereco] subsidiaries gives the N&W the benefit of substantial tax losses. In addition, some of these subsidiaries [including EL, Tr. 1293] which are not now on accelerated depreciation can be put on accelerated depreciation and the tax benefit derived by the N&W. This would mean that for a number of years after the effective date of the affiliation, the N&W would have to pay little, if any, taxes.
>
> "At a minimum, the N&W would be able to reduce its taxable income by between $150 and $200 million over a five-year period. That would increase net income by about $75 million to $100 million over that period, or $1 to $1.25 per share per year." Appendix at 8a.

arguments depend upon N&W's speculation that neither B&M nor D&H will in fact be included in the N&W system, which is simply N&W's attempt to churn rumors into a basis for judicial decision.

N&W states "the Commission has never considered whether such inclusion [of EL alone in N&W], on the terms prescribed, is either in the public interest or equitable to N&W." J. S. 779, at 18. In fact, the Commission has twice found that EL alone should be included. The Commission's report and order expressly finds that N&W should be required to include EL whether or not D&H and B&M are included. 330 I. C. C. at 828, 868. On reconsideration, N&W urged at page 25 of its August 1, 1967, reply to the petitions of D&H, B&M and others that "all of the evidence of record relating to traffic gains and savings, and the Commission's findings with respect to the public interest, are based upon the explicit premise that all three of the petitioning railroads will be included." In its August 10 report on reconsideration, the Commission specifically repudiated N&W's contention in unambiguous language, stating "we disagree with N&W's assertion that inclusion of all three petitioners explicitly premises our decision herein." 331 I. C. C. at 41. The Commission then repeated its finding that EL alone should be included whether or not D&H and B&M are included. *Id.* at 43, 45. Those statements by the Commission dispose of N&W's first contention.

N&W also claims that "EL's viability would be severely curtailed if B&M or B&M and D&H were either no longer viable or allied with Penn-Central." J. S. 779, at 16. There is no evidence to support, or suggest, that conclusion.* In-

*N&W distorts the record, as it tried to do below, see N&W reply brief below at 19-20, when it attempts to promote EL's earlier testimony in the Penn-Central *Merger* case, that EL as an independent might lose $44 million in revenue as a result of a Penn-Central

deed all of the evidence directly supports the opposite conclusion. We demonstrate in EL's Brief Below at pages 40-43 that the record establishes that whether or not D&H and B&M are included will have little effect upon the amount of traffic which N&W and EL are able to reroute for their benefit. EL submitted two-way traffic studies to show the gain to the N&W-EL system that would result from two-way control. Ex. EL-101; EL S-7, Wyer, at 61-62. D&H and B&M also presented two-way studies which demonstrated their inability to reroute traffic away from EL. Ex. B&M-52; Ex. D&H-3d. Those studies are discussed in EL's Brief Below at pages 40-43. N&W presented three traffic witnesses who dealt at great length with the traffic patterns

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merger, into some kind of evidence that EL as a subsidiary of the N&W system would lose the same amount to Penn-Central. J. S. 779, at 22-23. As the district court pointed out, J. S. 779, at B-60, EL's traffic witness Schmidt made clear in this record that he did not make any study of the traffic EL as a subsidiary of N&W might lose to Penn-Central and he never expressed any opinion on that subject. Tr. 408. Schmidt was well aware that the hearing examiners at page 374 of their report served March 29, 1965, in the Penn-Central *Merger* case rejected Schmidt's 1962 study of the impact of Penn-Central on an independent EL as "highly exaggerated." EL S-6, Schmidt, at 19. Schmidt also testified in this record that the substantial improvements in service, car supply and operating efficiency of EL between the time of his 1962 study in the *Merger* case and his 1966 testimony here had made EL better able to compete and hence its traffic was far less susceptible to diversion in 1966 than it had been in 1962. *Ibid.*

It is also worth pointing out that N&W conceded toward the end of the hearings that cross-examination of Schmidt had failed to produce anything "helpful in a numerical way" with respect to the alleged loss to Penn-Central by EL as a subsidiary of N&W. Tr. 3276. Because N&W felt that "we had no dollar figure for the losses to Penn-Central under control" in the record, Tr. 3275, N&W undertook to present its own estimate of those losses through its witness McMichael (Ex. N&W-52); N&W stated that "we rely on that figure as to the extent of the control loss." Tr. 3277. That evidence dealt entirely with the losses under four-way control. N&W never submitted any estimate of the traffic which might be lost to Penn-Central if EL alone were controlled by N&W.

which would result from an N&W system including all three petitioners. Ex. N&W-13, McGohan; Ex. N&W-14, Fitzpatrick; Exs. N&W-15 and N&W-52, McMichael. However, N&W did not submit any evidence attempting to demonstrate what the traffic results of an N&W-EL system, without D&H or B&M, would be. Rather N&W relied specifically on N&W witness McMichael's estimate of loss to Penn-Central based on an analysis of an N&W system including all three petitioners. Tr. 3277.

N&W's speculation that D&H and B&M may, after all this time and effort, elect not to become a part of N&W appears highly exaggerated. The inclusion of D&H in N&W seems assured. D&H does not challenge the terms fixed by the Commission and its Board of Directors has voted unanimously to recommend to its stockholders acceptance of the terms proposed by the Commission. If B&M should elect not to be included in N&W, there are two possible alternatives. First, B&M may remain independent. If that possibility occurs, there will be no significant impact on EL or N&W. Second, B&M may reach an agreement with Penn-Central. Of course, the Commission may or may not find such a proposal to be in the public interest. If the Commission should do so, however, it would also have the duty to impose protective conditions upon a Penn-Central-B&M system in favor of an N&W system which established the need for such conditions. Interstate Commerce Act, § 5(2)(b). Clearly, if any such problem arises in the future, that is the time to be concerned about solving it; not now when there is no record even to support any concern about the existence of such a problem.

Finally, even if N&W were correct about D&H and B&M, neither the public interest in inclusion of EL in N&W nor EL's value to N&W would be affected.

CONCLUSION

There being no substantial questions presented, the judgment of the court below should be affirmed.

November 27, 1967.

Respectfully submitted,

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MEMORANDUM READ BY PRESIDENT OF N&W TO ITS BOARD OF DIRECTORS ON AUGUST 31, 1965*

For consideration by the Board, we have worked out a plan under which the C&O would be merged into the N&W, and we would offer to include in our system on specified terms five other major Eastern railroads: Erie Lackawanna, Delaware and Hudson, Boston and Maine, Reading and Central of New Jersey. The system, when consummated, would be substantially the same size as the proposed PRR-NYC system. The C&O Board is meeting in Cleveland now to consider this proposal.

According to the plan, C&O and N&W would merge on the basis of .725 share of N&W common stock for each outstanding share of C&O common. Each company would have equal representation on the Board of the surviving company. N&W-C&O would offer to take in the other five railroads as follows:

N&W-C&O would form a subsidiary, tentatively called Dereco. They would obtain all of the outstanding common stock of Dereco, which would amount to slightly more than 80% of the voting stock, in exchange for N&W-C&O stock and $6 million in cash. The N&W-C&O stock would be used in connection with acquisition of the Delaware and Hudson, and the cash would be used for working capital.

Dereco would then form five wholly owned subsidiaries having names substantially similar to the five railroads to be acquired and into which the five railroads would be merged.

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*It was solely upon the basis of this memorandum, contained in Ex. EL-142, that on August 31, 1965, the N&W Board of Directors approved the N&W-C&O Dereco proposal, Tr. 1287, 1298, under which EL's stockholders would have received stock valued by N&W at more than $43 million. Tr. 1288, 1623.

Delaware and Hudson Company would be merged into Delaware and Hudson Railway, a new company, on the basis of .25 share of N&W-C&O common for each outstanding share of Delaware and Hudson Company common.

Erie Lackawanna Railroad would be merged into Erie Lackawanna Railway, a new company, on the basis of .225 share of Dereco "A" stock for each share of Erie Lackawanna Railroad preferred and .065 share of Dereco "B" stock for each share of Erie Lackawanna Railroad common.

Reading Company would be merged into Reading Railway Company, a new company, on the basis of .15 share of Dereco "A" stock for each share of Reading first preferred, .075 share of Dereco "A" and .075 share of Dereco "B" stock for each share of Reading second preferred and .15 share of Dereco "B" stock for each share of Reading Company common.

Central Railroad Company of New Jersey would be merged into Central Railway Company of New Jersey, a new company, on the basis of .15 share of Dereco "B" stock for each share of Central Railroad Company of New Jersey common.

Boston and Maine Corporation would be merged into Boston and Maine Railway Company, a new company, on the basis of .175 share of Dereco "A" stock for each share of Boston and Maine Corporation preferred and .10 share of Dereco "B" stock for each share of Boston and Maine Corporation common.

There would be issued approximately 220,000 shares of Dereco Class "A" stock, which would have a stated value of $130 a share. It would have priority in liquidation in an amount equal to stated value and priority to noncumulative dividends over Dereco Class "B" and common stock in the amount of $5.20 per share. It would be convertible five years after issuance into N&W-C&O common on a share-for-share basis. It would be callable at $150 after six years if not converted.

There would be issued approximately 669,000 shares of Dereco Class "B" stock, which would be subordinated to Class "A" stock. It would have a stated value of $130 a share. It would have priority in liquidation over Dereco common in an amount equal to stated value and priority to noncumulative dividends in the amount of $5.20 per share. Like Dereco Class "A", it would be convertible five years after issuance into N&W-C&O common on a share-for-share basis and would be callable at $150 after six years if not converted.

Dereco common stock with a stated value of $32.50 per share would be subordinated to both Class "A" and Class "B" stock. After dividends on both those classes in the amount of $5.20 per share in any year, the common stock would be entitled to dividends at the rate of $1.30 per share. Any additional annual dividends would be shared between Class "A", Class "B" and common shares in relation to their respective stated values.

N&W and C&O plan to file with the ICC on or before November 1, 1965, an application for authority to merge. In the application, N&W and C&O would offer to accept as a condition of their merger the requirement that they offer to include the Erie Lackawanna, Delaware and Hudson, Boston and Maine, Reading and Central of New Jersey on the above-described terms, provided that:

(1) Present federal tax law is modified to permit the N&W-C&O to obtain the benefit of the tax carry-forward losses of the four loss companies (Erie Lackawanna, Boston and Maine, Reading and Central of New Jersey). A bill has been introduced into Congress by Representative Keogh of New York (H. R. 10542) to achieve this purpose.

(2) A permanent solution is found to the commuter problem of the Central of New Jersey, Reading and

Erie Lackawanna which would relieve these railroads of any losses in performing this service.

(3) There is no substantial adverse change in the financial position of any of the five subsidiaries.

There are compelling reasons for our affiliation with the C&O. At the present time, we have a favorable competitive situation in the territory we serve. There are now four major systems in the East. Measured by gross revenues, we have 18.3% of the market for rail traffic, C&O-B&O has 26.4%, PRR 31.2% and NYC 24.1%. While we are the smallest of the four systems, our location and traffic consist would permit us to compete on favorable terms if there are no further affiliations.

But if the PRR merges with the NYC and takes in the New Haven, it will have 57.0% of the gross revenues of the three systems, C&O-B&O will have 25.4% and we will have 17.6%. PRR-NYC will obviously be the dominant system in the East. We will be the only system without north-south routes between New England, New York and the south. We will serve only one port, Norfolk, which is the least important of the North Atlantic ports insofar as general cargo is concerned. PRR-NYC will serve all ports from Norfolk to Boston, and C&O-B&O will serve all ports from Norfolk to New York. Our competitive position would be substantially impaired.

If PRR and NYC merge, we could react by affiliating with the EL, D&H and B&M, and the C&O-B&O would, in all probability, eventually take over the Reading and Central of New Jersey. If that occurrred, we would have 24.1% of the gross revenues, C&O-B&O would have 26.1% and PRR-NYC 49.8%. PRR-NYC would still be the dominant railroad. While we would get into New York and Boston, it would be a high price, and we would

still have no north-south routes to compete with either the C&O-B&O or PRR-NYC.

From offensive and defensive standpoints, affiliation with the C&O now offers an attractive alternative in view of these prospective developments. Basically, it would create a strong system of even greater size than the PRR-NYC system. It would produce substantial financial benefits which would more than offset the price we would have to pay in taking in the financially weak companies, which would have to be done in order to obtain ICC approval and to produce two major railroad systems in the East. If this occurred, the N&W-C&O system would have 50.2% of the gross revenues and PRR-NYC 49.8%.

If this project is to be attempted, it must be done now. An undertaking of this size and scope, which requires a major change in the course railroad mergers have been taking in the East, presents a number of problems. However, we believe we have a reasonable chance of success. In essence, our point would be that merger of the N&W and C&O offers the only way of saving a number of railroads in the East and that it would provide a better balanced system than the three-party system previously contemplated.

As a practical matter, we think that if the PRR-NYC merger goes through, the N&W-C&O merger would have a good chance of going through, and, conversely, if the N&W-C&O merger were denied, there is a good chance that the PRR-NYC merger would be denied also. In either event, we would be better off than if we permitted the PRR-NYC merger to go through and had to face the decision of either taking in the EL, D&H and B&M or trying to compete on the basis of our present system.

Under our proposed plan, N&W's financial commitment will be firmly protected. If the Dereco subsidiaries, or any

of them, fail, N&W will have recovered its investment through the loss carry-forwards, which aggregate some $200 million. Assuming relief from only 75% of their commuter losses and merger savings of about $21 million realizable over a period of five years, our studies indicate that the total cash earnings (pretax) from the B&M, EL, CNJ and Reading subsidiaries would range from $4.7 million after the first year following affiliation to $29.4 million after the fifth year. This would be in addition to about $8.5 million of cash earnings from the D&H based on 1964.

In working out the exchange ratio of .725 with the C&O, we were aided by the investment banking firm of R. W. Pressprich & Co. of New York. They are of the opinion that the deal is fair and equitable to both sides. On the basis of current reported earnings and stock prices, the C&O stockholder would get a substantial premium. On 8/13/65 N&W common sold at 130 and C&O at 70. This would produce an exchange ratio of .54. On the basis of 1964 earnings after tax of $8.52 and $4.86, an exchange ratio of .57 would be justified. On the basis of 1965 estimated net income of $9.25 to $9.50 for the N&W and $4.93 for the C&O, an exchange ratio of .52 or .53 would be produced.

On the other hand, C&O owns about 90% of the B&O's stock and 63% of the Western Maryland's stock, but its share of the earnings of these companies is not reflected in C&O's reported earnings. If the C&O's share of these earnings had been included in its 1964 report, C&O would have shown earnings of $5.80 which would have produced a ratio of .68. This would have meant pro forma net income for the new N&W of $8.31 a share, or a reduction of N&W's earnings of 21 cents a share. To make up this difference, the new N&W would have to increase its earnings by $3.3 million by merger savings or otherwise.

However, B&O's accounts are not strictly comparable to those of C&O and N&W because B&O has obtained most of its equipment through lease from a subsidiary of the C&O. In effect, therefore, B&O is charging as an expense a part of the cost of its equipment which both N&W and C&O capitalize and charge against depreciation over a longer period of years. If adjustment were made for this difference, B&O's 1964 earnings would have been increased by $4.4 million and C&O's consolidated earnings would have been $6.30. This would produce an exchange ratio of .74. On this basis, the pro forma earnings of the new N&W would have been $8.59 in 1964 as compared with a reported $8.52.

It is estimated that the consolidated earnings for C&O-B&O-WM for 1965, on an unadjusted basis, will range between $6.49 and $6.70. Assuming earnings of the N&W between $9.25 and $9.50, we reach an exchange ratio of .68 to .724. Assuming the higher earnings of $9.50 for the N&W and the lower earnings of $6.49 for the C&O, we get pro forma net income of $9.28 a share, or a dilution of 22 cents a share, or $3.4 million. Assuming the lower earnings of $9.25 for the N&W and higher earnings of $6.70 for the C&O, we get no dilution.

On an adjusted basis, the C&O-B&O-WM's earnings are estimated at $7.00 to $7.21, which produces exchange ratios of .74 to .78. On this basis, therefore, in all cases there would be an increment to the N&W's earnings, ranging between 6 cents and 28 cents a share.

In sum, there are many statistical yardsticks which can be used to justify the .725 exchange ratio, some of which produce much higher ratios and some much lower. In this instance, however, we do not have to rely upon any projected savings. We simply have to give recognition to the C&O's ownership of B&O and Western Maryland stock

and make an adjustment in the B&O's reported income to put the figures on a comparable basis. The enormous benefits from the merger resulting from both savings and additional business will then flow to the stockholders of both companies on the basis of their ownership of the new company (59.56% to the N&W and 40.44% to the C&O).

The merger of the C&O into the N&W is not only attractive from the standpoint of the stockholders of both companies, but the inclusion of the other railroads through subsidiaries makes the deal even more attractive. Inclusion of these subsidiaries gives the N&W the benefit of substantial tax losses. In addition, some of these subsidiaries which are not now on accelerated depreciation can be put on accelerated depreciation and the tax benefit derived by the N&W. This would mean that for a number of years after the effective date of the affiliation, the N&W would have to pay little, if any, taxes.

At a minimum, the N&W would be able to reduce its taxable income by between $150 million and $200 million over a five-year period. This would increase net income by about $75 million to $100 million over that period, or $1 to $1.25 per share per year. Net income could be further increased by any savings realized and by any increased business generated by the new system. On the basis of projections which we have made in conjunction with R. W. Pressprich, we can visualize pretax net income in the $18 per share range as compared with $11.82 which the N&W earned in 1964. This projection does not take into account any new business which the expanded system could develop.

Is the proposed plan fair to the present stockholders of the proposed subsidiaries? The present D&H stockholders would get N&W stock on a basis related to earnings and present stock market prices. They now have a dividend-paying stock and will get a dividend-paying stock. The stock-

holders of the CNJ, Reading EL and B&M have not received dividends for a number of years. We propose to give them what is, in effect, a non-cumulative preferred stock (Class "A" or Class "B") of Dereco. It is unlikely that Dereco would pay any dividends to these stockholders during the first five-year period, although each class would be preferred as to dividends over the common stockholders. What makes the Dereco's Class "A" and Class "B" stock attractive is its right to be converted on a share-for-share basis for N&W common after five years.

This right, which is in substance a call on N&W stock, would have a current market value closely related to the present value of the outstanding stock of the proposed subsidiary. R. W. Pressprich believes this is a fair proposal. It not only gives these stockholders an immediate market value but a participation in what we reasonably expect to be the improved earnings and market price of N&W common.

Nos. 830, 831

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

OSCAR GRUSS & SON, *Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

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November 27, 1967

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Appellees The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) respectfully submit that the final judgment of the District Court dismissing the complaints of appellants Oscar Gruss & Son (Gruss) and The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (Committee) was correct and should be summarily affirmed.

STATEMENT

Appellant Gruss is a holder and appellant Committee a representative of holders of 4% First Mortgage Bonds of The New York, New Haven and Hartford Railroad (New Haven), which is in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut. They challenge the judgment of the New York three-judge District Court because that Court declined to require a postponement of the Penn-Central merger until such time as the New Haven could be simultaneously included in the merged system. The Committee—but not Gruss—urges alternatively that the Commission erred in failing to impose for the New Haven protective conditions similar to those imposed for three other railroads, to be operative during the period between merger and inclusion.

The New Haven is in critical condition. Its Trustees have represented, without contradiction, that the cash available for operations will be exhausted very shortly after the year's end. This condition has to no degree been brought about by the Penn-Central merger, for that merger has not yet taken place. Thus, whereas at one time the merger of Penn and Central might have been seen as both a "threat" to and an "opportunity" for the New Haven (*Chase Manhattan Bank* v. *Smith*, 378 F. 2d 635, 636 (2d Cir. 1967)), today the "threat" is no longer relevant because the New Haven's death is imminent for reasons unrelated to the merger. Only the "opportunity" that the merger offers to preserve the freight and passenger operations of the New Haven still remains, but that opportunity depends entirely on the promptest possible consummation of the merger.

The question of inclusion of the New Haven in Penn-Central came to the forefront early in the merger proceed-

ings before the Commission. The Trustees of the New Haven, pursuant to authority granted by the Reorganization Court, intervened in those proceedings in June 1962, petitioned for inclusion of the New Haven's freight operations, and actively participated in the ensuing hearings. Neither Gruss nor the Committee attempted to intervene or otherwise to participate at this stage of the proceedings before the Commission.

Initially, the Trustees urged that inclusion of the New Haven's freight operations should be made a condition precedent to consummation of the merger, but presented no suggested terms for such inclusion. On March 29, 1965, the Examiners issued their recommended report. The report concluded that while the New Haven's freight operations should be included in the Penn-Central system, actual inclusion at the time of merger should not be a condition precedent. Prior to the issuance of the Examiners' Report the Trustees had independently reached the same conclusion as the Examiners. This conclusion was reflected in a memorandum of understanding between the Trustees on the one hand and Penn and Central on the other which resulted from negotiations that had begun soon after the close of the hearings before the Examiners. This memorandum was filed with the Reorganization Court on April 7, 1965.[1]

The Trustees filed no exceptions to the Examiners' recommendations. On the contrary, on August 16, 1965, in a reply to the exceptions of certain other parties, they supported the Examiners' conclusion that inclusion of the New Haven's freight operations should take place subsequent to the merger. Gruss and the Committee filed no

[1]The Trustees, Penn and Central subsequently embodied the terms of the Memorandum of Understanding, as amplified, in an agreement dated April 21, 1966, which was filed with the Reorganization Court on the same date. The agreement was expressly subject to the approval of both the Commission and the Reorganization Court.

exceptions to the Examiners' Report and expressed no dissatisfaction with the Trustees' action to either the Commission or the Reorganization Court.

On April 27, 1966, the Commission released its report and order, dated April 6, 1966, in the Penn-Central merger case. The order adopted the Examiners' recommendation regarding inclusion of the New Haven but required inclusion of its passenger operations as well as its freight operations. (327 I. C. C. at p. 553) The Trustees, Penn and Central agreed to modify their agreement to encompass these deficit operations, without reducing the consideration provided for in the agreement.

Although it was clear by April 1965 both that the Examiners had recommended that actual inclusion of any part of the New Haven's operations should not be required as a condition precedent to consummation of the Penn-Central merger and that the Trustees had determined to take a like position, neither Gruss nor the Committee made any effort to assert their present contrary position until more than fifteen months later. It was not until July 11, 1966, that appellant Gruss petitioned for leave to intervene, seeking further hearings and a modification of the Commission's April report and order to require that actual inclusion of the New Haven be made a condition precedent to consummation of the merger. On September 19, 1966, the Commission issued a report on reconsideration dated September 16, 1966, holding that the relief requested by Gruss was not justified and generally denying the Gruss petitions. Recognizing Gruss' interest in the ultimate outcome of the New Haven inclusion proceeding, however, and "to obviate the need for another petition" in order for Gruss to participate in that proceeding, the Commission permitted Gruss to intervene and become a party. (328 I. C. C. at pp. 306-07, 330)

In October 1966 appellant Gruss sued in the District Court from which this appeal is taken, seeking to defer consummation of Penn-Central pending New Haven inclusion. Appellant Committee brought a similar action, and also intervened in the *Gruss* action.

On November 28, 1966, the Court held that the complainants lacked standing to maintain the actions, and that in any event the Commission had acted "reasonably and within its powers." (261 F. Supp. 386, 394) Appellant Gruss appealed that order to this Court, which without considering the merits of the appeal vacated the order and remanded the case to the District Court to permit Gruss, if it desired, to "attempt a fresh challenge" to the Commission orders upon the completion of further proceedings regarding inclusion of the New Haven then under way at the Commission. (*Oscar Gruss & Son* v. *United States,* 386 U. S. 776, 777 (1967))[2] The Committee did not appeal.

On January 16, 1967, hearings began before a Commission Examiner directed to the question of fair and equitable terms for the inclusion of the New Haven in Penn-Central. These hearings, in which both appellants participated, ended May 12, 1967, and the matter was set directly for an argument before the Commission which was held on June 15, 1967.

On June 9, 1967, the Commission entered a supplemental report and order in the Penn-Central case (330 I. C. C. 328), pursuant to this Court's mandate in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967). That order

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[2]Gruss argues that this mandate required the District Court to remand "the Gruss matter" to the Commission. (J. S., pp. 32-36) We submit that it is clear from the terms of the mandate that it imposed no such requirement. In any event, Gruss' argument is effectively mooted by the fact that it had a full opportunity to present its contention that an "interim inclusion" of the New Haven should be accomplished at the time of consummation of the merger in the hearings that culminated in the Commission's Second Supplemental Report dated November 16, 1967. (See pp. 8-9, *infra*)

authorized immediate consummation of Penn-Central. On July 10, 1967, appellants filed supplemental complaints in the District Court challenging the authority of the Commission to permit consummation without insisting on simultaneous inclusion of the New Haven.

Meanwhile, the financial condition of the New Haven had become very critical. In an opinion dated July 11, 1967 (printed as an Appendix to the Application for Stay filed by appellant Gruss in this Court on November 2, 1967), the Reorganization Court found that "Whether the New Haven can survive in the interim between the present and the date of the Penn-Central merger depends in large measure upon how long that merger will be deferred." The Court concluded that the Commission should be asked to order "inclusion"—by way of a lease or otherwise—as soon as the merger was consummated. The Trustee for the First Mortgage Bonds made a proposal to this end to the Commission on July 17, 1967. Gruss and the Committee, among others, supported the proposal.

The Commission responded promptly. By order dated August 1, 1967, it directed the New Haven Trustees and Penn and Central to negotiate an agreement, subject to the Bankruptcy Act, "providing for [interim] operation of the NH by Penn-Central by lease" and to file the agreement—or proposals for the terms of a lease if no agreement were reached—with the Commission within 30 days. The Commission declined to comment on the terms such a lease might contain, except to note "that it would be inequitable during the lease period to place the entire burden of the NH operating deficits upon Penn-Central" and that consideration should be given to terms which would equitably distribute that burden.[8] The Commission's order (which is printed

[8]The Reorganization Court had pointed out, in its July 11 opinion, that

> "* * * safeguards should be provided against creditors or a group of creditors holding up the acquisition of the assets of

as Appendix 1 to the Application for Stay filed by appellants B&O, *et al.*, in this Court on November 2, 1967), also stated "that consummation of the merger shall constitute an irrevocable assent" by Penn-Central "to operation of the New Haven under such just, reasonable and equitable lease terms as the Commission may require," subject to judicial review of the effect the lease operations might have "upon the final adjustment of the inclusion terms."

The New Haven Trustees, Penn and Central all concluded that it would be impossible to prepare a lease that would be effective in time to meet the New Haven's desperate cash needs. On September 1 they so advised the Commission and submitted two alternative proposals. Each involved a commitment by Penn-Central, immediately upon consummation of the merger, to lend the New Haven $25,000,000 over a three-year period by purchasing Trustees' Certificates in that amount. The Trustees' proposal additionally contemplated the sharing by Penn-Central of operating deficits incurred by the New Haven between consummation of the merger and inclusion in the Penn-Central system, whereas the Penn and Central proposal contained no such provision.

The Commission took note of these proposals in an order of September 12, 1967 (printed as Appendix 2 to the Application for Stay of B&O, *et al.*), which directed a hearing on September 25, 1967, to determine what arrangement would equitably "afford the most suitable means of assuring the continuation of the NH's operations until the NH assets can be transferred to the ownership of Penn-

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the New Haven by the merged railroad while the latter carries the risk of further operational loss, so that they, the creditors, can at their leisure and without fear of further diminution of the value of the New Haven's assets for operational reasons, indulge in unlimited litigation in the hope of enhancing their positions."

Central * * *." This order, like the August 1 order, provided that consummation of the merger would constitute irrevocable assent by Penn and Central, subject to judicial review, to whatever interim arrangement the Commission determined to be appropriate.

On October 19, 1967, the District Court rendered its decision rejecting the challenge made by these appellants and others to the Commission's orders approving and authorizing prompt consummation of Penn-Central. The Court recognized that "while some progress has been made in the direction of inclusion of NH in Penn-Central by sale of its assets, the day of such inclusion is at best some time off." (B&O J. S., p. B-23) It also recognized that "it has become unhappily evident that events will not await the resolution" of the various issues whose determination must precede inclusion (*id.* at p. B-24), in light of "the forecast of the NH Trustees that their cash will run out at the end of 1967" (*id.* at p. B-70). The Court emphasized that "no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central." (*Ibid.*) It found that "what is urgent to avoid cessation of NH's vital service are (1) early consummation of the Penn-Central merger and (2) a Commission order prescribing some form of financial aid that will permit the NH's operations to continue beyond December 31, 1967, when, as the NH Trustees now advise, their cash available for operations will be exhausted." (*Id.* at p. B-29) Under these circumstances, the Court concluded, "there can hardly be doubt that it is better to accept what is good for the New Haven than permit the patient to die while in quest of the best." (*Ibid.*)

On November 21, 1967, the Commission issued a Second Supplemental Report on Further Hearing, dated November 16, 1967, approving as fair and equitable the terms for the

inclusion of the New Haven that had been agreed upon between the New Haven Trustees and Penn and Central.[4] The Commission's report also provided for interim support of the New Haven by requiring Penn-Central to make loans of up to $25,000,000 over a three year period upon specified terms and to share substantially in the operating losses of the New Haven, on the basis of a prescribed formula, pending inclusion. (*Id.* at pp. 79-108)

ARGUMENT

Shortly after December 31 of this year the New Haven will exhaust the cash it has available for operations.[5] This means that unless it receives prompt financial assistance it will in all probability cease to function as an operating railroad. And as the District Court noted, "no one has indicated any probable source of funds for that beleaguered property other than the merged Penn-Central." (B&O J. S., p. B-70)

Faced with this critical fact the Committee and Gruss adopt somewhat different lines of contention. The Committee in one branch of its argument simply ignores the emergency that now confronts the New Haven. It argues that consummation of the Penn-Central merger may not take place until the terms and conditions for the inclusion of the New Haven that have been determined by the Commission have been approved by the Reorganization Court, sustained on judicial review, and accepted by the New Haven security holders. In view of the present situation of

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[4]Copies of the Report in slip sheet form have been supplied to the Court. The Report will be cited herein as "Commission's November 16 Report."

[5]See Commission's November 16 Report, p. 81:

> "The evidence indicates that the NH will need cash assistance in January 1968. To avoid the collapse of the NH's operations, action must be taken now."

the New Haven, acceptance of this contention would mean that the New Haven would cease operations and ultimately go into liquidation. Gruss, on the other hand, apparently recognizes that continued operation of the New Haven depends upon the merger being promptly consummated but nevertheless contends that there must be "immediate inclusion" of the New Haven although the Commission has found that the form of "immediate inclusion" that Gruss pressed before it—a lease arrangement—could not be accomplished in time to give the New Haven the financial assistance it urgently needs. (Commission's November 16 Report, p. 87) Both lines of argument are without merit.

I. The Penn-Central Merger Should Not Be Delayed Pending Review by the Courts of Specific Terms and Conditions for the Inclusion of the New Haven and Acceptance of Those Terms by the New Haven Security Holders

The Committee argues that until there is certainty that the ultimate outcome of the New Haven reorganization will be inclusion in Penn-Central rather than liquidation the Penn-Central merger may not take place. In making this argument the Committee assumes that under *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298 (1954), the security holders of the New Haven have an absolute right to prevent inclusion and to insist upon liquidation. On this assumption the Committee argues that if the security holders of the New Haven choose liquidation the merger may not lawfully be accomplished because

> "there is absolutely no question that if the New Haven is not included in the Penn-Central system, the Penn-Central merger would be contrary to the public interest." (Committee J. S. , p. 19)

This argument is an undisguised assertion that if the security holders of the New Haven decide that their private interests will be better served by liquidation of the New Haven than by its inclusion in the Penn-Central system, they have the power to prevent the merger and thereby to deprive the carriers and the public they serve of the benefits that the merger promises.[6]

The Committee attempts to support this argument by contending that the Commission found that if the New Haven ceases to be a viable carrier so that it cannot be included in the Penn-Central system the Penn-Central merger will not be in the public interest. The Commission made no such finding. The Committee's argument rests upon a misreading of one statement in the Commission's original report. The statement appears in a passage in which the Commission was discussing whether the condition for inclusion of the New Haven should include its passenger business as well as its freight business or only the latter.[7] In discussing this point the Commission said (327 I. C. C. at p. 524):

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[6]See the Commission's November 16 Report, p. 14:

> "The choice is clear: either the public at large is forced to stand in the wings awaiting progress in transportation while the NH creditors haggle on stage over the wasting corpus of the NH estate, or, on the other hand, the overall objectives of the law are served, with the broad public interest brought into the scene in the form of improved service through a consummated Penn-Central merger including an operational NH, while the NH creditors are freed to litigate at will the distribution of their estate."

[7]The Examiners had recommended, and the Trustees and Penn and Central had agreed, that only the freight business should be included, with passenger inclusion to be considered later. The Commission noted that unlike the Examiners it had before it the results of an inquiry under Section 13a of the Interstate Commerce Act into whether the New Haven's passenger service should be discontinued. It was thus able to take a broader view of the New Haven's situation, and it concluded that both freight and passenger operations should be included.

> "*In this context,* and in the light of and subject to the order in the section 13a [passenger discontinuance] proceeding which is being served simultaneously with this report, we find that this merger, without *complete* inclusion of NH, would not be consistent with the public interest, and, accordingly, we will require *all* the New Haven railroad to be included in the applicants' transaction." (Emphasis added)

The Committee extracts from this quotation the phrase "we find that this merger, without complete inclusion of NH, would not be consistent with the public interest," and argues that it means that if the New Haven is liquidated and for that reason cannot be included in Penn-Central the merger will be against the public interest. (J. S., p. 19). The words cannot reasonably be read in this way. The Commission's language simply means that given a not yet dead New Haven, the Penn-Central merger should not be permitted to proceed without inclusion of all as opposed to only part of the New Haven. The Commission had previously found that even if the merger application were denied the New Haven, which it described as an "already moribund carrier," would face "a nearly insuperable task in bringing itself out of bankruptcy." (327 I. C. C. at p. 522) The passage on which the Committee relies assumed that if the New Haven were viable at the time of the merger it might thereafter be injured in its traffic by the merged company so as to leave it "in perhaps an irretrievable situation" (*ibid.*) and that accordingly protection should be afforded against that possibility. That passage as well as the Commission's ultimate finding on New Haven inclusion (see 327 I. C. C. at pp. 526-27) was designed to provide that protection by requiring Penn-Central to accept inclusion on such equitable terms and conditions as the Commission might determine and the Reorganization Court approve.

The Committee's argument that the Penn-Central merger was found in the public interest by the Commission only because it might rescue the New Haven simply ignores the Commission's detailed findings on the merits of the merger proposal concerning the problems of the applicant railroads and the benefits to be derived from the merger by applicants and the shipping and general public. These findings, which in themselves provide ample support for the Commission's determination that the merger is in the public interest, are not related in any way to the New Haven and are inconsistent with the suggestion that the Commission would not have concluded that the merger would be in the public interest but for the fact that it might make possible the inclusion of the New Haven. That the Commission could not have contemplated that any failure of inclusion by reason, for example, of action of the New Haven security holders would be permitted to frustrate the Penn-Central merger is evident from the fact that it authorized consummation of the merger although recognizing that the matter of subsequent inclusion would be "subject to appropriate procedures of approval in the United States District Court under the Bankruptcy Act." (327 I. C. C. at p. 527)

The Commission's November 16 Report casts further light on this question. The Commission there states that (p. 13):

> "Our prime purpose in requiring inclusion of NH in the merged Penn-Central system is to assure continuity of NH service (which we have found essential to the public) as an integrated part of the Penn-Central system and under the system's management."

and that

> "To place the NH problem in perspective, we first note that at the time of our first report in these

> proceedings the public interest considerations affecting the entire Eastern District, and even territory beyond, justified the approval of the Penn-Central merger despite the weak position of NH. *Certainly, the plight of that company was not reason enough to deny the public in general and the shipping public in particular the many economic and transportation benefits the Penn-Central merger will produce.*" (Emphasis added)

In light of these passages, appellants' argument that the Penn-Central merger was found by the Commission to be in the public interest only because it was believed to solve the problems of the New Haven is unpersuasive.

Appellants attempt to draw a parallel between the situation of the New Haven and that of Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D&H) and Boston & Maine Corporation (B&M). They argue that this Court has held that the Penn-Central merger may not be consummated until the inclusion of the latter three roads in a larger system is reasonably assured and urge that the likelihood of New Haven's ultimate inclusion in Penn-Central has not yet attained that degree of assurance. This argument ignores the fundamentally different situation of the New Haven, on the one hand, and the other three roads on the other. The Commission found as to the three roads that it was the Penn-Central merger that threatened their existence. In contrast the New Haven, as the Commission found, is near death for reasons wholly unrelated to the Penn-Central merger, and it is the merger that provides its only hope of salvation.

II. Consummation of the Penn-Central Merger Should Not Be Delayed Because of Appellants' Threat to Seek Liquidation of the New Haven Unless Their Demands For "Immediate Inclusion" Are Met

Gruss' primary contention, and the Committee's secondary and alternative one, is that the Commission should not have permitted the merger to take place without providing for some form of interim "inclusion" which would take effect upon consummation of the merger and transfer all of the New Haven's operating losses to Penn-Central while the question of inclusion or liquidation is being determined in the Reorganization Court and on judicial review. The losses that appellants seek thus to transfer would include not only any losses caused by the Penn-Central merger, but also ordinary operating losses bearing no relation to that merger. And the Committee makes it plain that it would expect to remain free to press for liquidation even if such a transfer of losses is made, without suggesting any provision for compensating Penn-Central for having borne the losses if the "inclusion" proves to be temporary rather than permanent. (Committee J. S., p. 24)[8]

Both appellants seek to support their position by arguing that unless Penn-Central is required to absorb all of the operating losses of the New Haven pending a determination whether final inclusion is possible the New Haven will not survive the Penn-Central merger. This argument does not depend upon any showing that the course advocated by appellants is the only financially feasible method of preserving the New Haven in the interim period. It rests rather on their assertions that as creditors of the New Haven they will not be satisfied with any form of interim aid that does not involve the assumption by Penn-Central of all of the

[8]Gruss also appears to be of the view that interim "inclusion" would not necessarily result in final inclusion. (Gruss J. S., p. 30.)

operating losses and that if their demands are not satisfied they will press the Reorganization Court to dismiss the reorganization proceeding and thus in effect decree liquidation. It is their position that they will take this course because if Penn and Central "are permitted to merge before the ultimate fate of the New Haven is determined * * * they can litigate without end the terms of inclusion," while the New Haven continues to suffer losses. (Gruss J. S., p. 27. See also Committee J. S., p. 27)

Since appellants' jurisdictional statements were filed the Commission has issued, on November 21, 1967, its report and order (dated November 16, 1967) approving the terms of the purchase agreement between the New Haven Trustees and Penn and Central, and prescribing specific terms for interim support of the New Haven by Penn-Central following merger and pending final inclusion. Penn and Central do not intend to appeal the specified terms (although they believe that the Commission erred in requiring them to bear any part of the New Haven's interim losses), and hence even if they should be appealed by appellants it may reasonably be assumed that any different ultimate terms will be no less favorable to the New Haven. These terms destroy the force of appellants' argument. Any further litigation over the purchase price will be instituted not by Penn-Central but by appellants or others with similar interests. Penn-Central will have every incentive to press for the speediest possible resolution of any such litigation in order that final inclusion may be accomplished, so that it can reduce the New Haven's operating losses by instituting the economies that can flow only from a truly merged operation.[9] If Penn-Central were required to bear all of

[9]The Commission noted in its November 16 Report (at p. 105) that:

> "* * * during the period before conveyance of the NH assets to Penn-Central, whether a lease or loan arrangement prevail, the opportunities for integrating the NH's operations into

the New Haven's operating losses from the date the merger is consummated appellants and other New Haven creditors would be able to "litigate at length" not only over the price of inclusion but also over the value and relative rank of their different interests while Penn-Central suffered the entire financial burden of the New Haven's operations without having the power to manage or to dispose of its properties. (Commission's November 16 Report, p. 86)[10] The Commission obviously endeavored to strike a reasonable balance and to give neither party disproportionate incentives to delay final resolution of terms. No one, of course, can prevent appellants from rejecting the action of the Commission as unsatisfactory and from applying to the Reorganization Court for a dismissal of the reorganization proceedings leading to liquidation of the New Haven. But it may not be assumed that the desire of appellants will necessarily be the law of the Reorganization Court. Under the Commission's order interim relief to the New Haven depends upon consummation of the Penn-Central merger. If consummation is delayed there will be no interim relief for the New Haven. The process of liquidation could not be accomplished without very substantial delay and the Reorganization Court may well determine that even the private interests of the creditors, quite apart from the public interest, will be better served by acceptance of the terms for the New Haven's protection formulated by the Commission than by a dismissal of the reorganization proceedings.[11]

Penn-Central are restricted and, therefore, many operating economies and efficiencies cannot be realized until complete inclusion of the NH takes place."

[10]As we have noted at page 6 n. 3, *supra*, the Reorganization Court took specific note of this possiblity.

[11]In considering any application for such dismissal, the Reorganization Court would be required to consider not merely the private interests of appellants and others similarly situated, but also the public interest in continued operation of the New Haven. (See RFC v. Denver & R. G. W. R. Co., 328 U. S. 495, 535-36 (1946))

Appellants' threat to ask for liquidation cannot be regarded as a valid basis for setting aside the Commission's determination on the issue of interim relief. In making that determination the Commission provided for the continued operation of the New Haven, thus safeguarding the public interest, without giving overriding importance to any of the private interests involved. Even if it should be assumed that the Commission had the power to make Penn-Central bear all interim losses, the question is whether the Commismission was required to adopt this approach, to the exclusion of all others, before it could legally authorize the Penn-Central merger. No principle of law would support an affirmative answer to this question.

It must be borne in mind that appellants are at liberty to attempt to convince a reviewing court that the Commission erred in failing to order Penn-Central to bear a larger share of the New Haven losses—or all of those losses—in the interval between consummation of the merger and Penn-Central. Although we believe that any such attempt would fail, so long as appellants are free to make the attempt no legitimate interest of theirs requires a delay of consummation of Penn-Central even if it is assumed that the Commission will ultimately be found to have erred in refusing in its supplemental order dated November 16 to give them at that time the full measure of relief that they sought.

III. The Contention of Appellant Committee That the Merger Should Be Delayed Until The New Haven Is Given Interim Protective Conditions Against Traffic Diversion is Without Merit

Appellant Committee argues that if the merger precedes inclusion Penn-Central will divert traffic from the New Haven during the interim and thereby increase its operating losses. It says this must be prevented by imposing protective indemnity conditions upon Penn-Central if merger and inclusion are not to be simultaneous.

The Committee was permitted to press this contention before the Commission in the hearing that culminated in the Commission's November 16 Report. The Commission there declined to impose indemnification provisions, stating that "the record does not justify" such imposition. (P. 136) The Commission's conclusion was based on evidence "that the Penn-Central merger will not have any significant adverse effect on the NH for several years." "Before any such effect occurs," the Commission recognized, "the NH should be included in Penn-Central." (*Ibid.*) The Commission nevertheless went on to state that "if any unusual or unforeseen circumstances warrant our reconsideration of this matter, our general reservation of jurisdiction of this case can serve as a means for reexamining our position and further examining price." (*Ibid.*) As the District Court made clear in its November 28, 1966, opinion, the Commission has ample power "to base the acquisition price of NH upon a value not adversely affected by the NYC-PRR merger itself." (261 F. Supp. at p. 390)[12] It has done this in its November 16 Report. And even if the terms prescribed in that Report should be set aside, the Commission in setting new terms would be free in effect to charge to Penn-Central all losses caused by interim traffic diversion.

It is true, as the Commission points out, that the effect of diversion can be reflected in the acquisition price only if inclusion rather than liquidation ultimately takes place. But in the latter eventuality any compensation for diversion would in any event be inappropriate. The District Court correctly held that:

> "* * * we find nothing in the Interstate Commerce Act that would compel the Commission to require an operating railroad such as Penn-Central to reim-

[12]The fact that this relief is available sharply distinguishes the New Haven's situation from that of the three "protected railroads," E-L, D&H and B&M.

burse creditors of a defunct one for losses due to merger diversion." (B&O J. S., p. B-30)

From the foregoing it is apparent that appellants' fears of diversion are unwarranted and that even if they were assumed to be meritorious, they have already been met to the extent appropriate by the Commission's reservation of jurisdiction.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court dismissing the complaints of appellants Gruss and Committee was plainly correct and should be summarily affirmed.

Respectfully submitted,

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November 27, 1967

Nos. 833 and 836

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Supreme Court of the United States

October Term, 1967

BOSTON AND MAINE CORPORATION,
Appellant

v.

UNITED STATES OF AMERICA, et al.
Appellees

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, et al.,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

On Appeals from the United States District Court for the Southern District of New York

---

MOTION TO AFFIRM

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On Appeals from the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

Norfolk and Western Railway Company moves that the judgment of the three-judge court below, insofar as it dismissed the complaints of Boston and Maine Corporation and John Hancock Mutual Life Insurance Company, et al., be affirmed. In support of this motion to affirm, and in view of this Court's order of November 9, 1967, directing that the briefs filed in the three-judge court below be filed with this Court, Norfolk and Western relies on, and hereby incorporates by reference, the

grounds set forth in its brief dated September 25, 1967 (67 Civ. No. 2451). In addition, N&W states as follows:

Boston and Maine asserts that the terms prescribed for its inclusion in N&W are inadequate because the Commission erred in adopting the estimates offered by B&M's own witness of the savings which would accrue upon the control of B&M by N&W (B&M J. S., p. 15). B&M attempts to belittle the savings study of its witness, Mr. William Wyer, by asserting that Mr. Wyer was somehow constrained by an assumption that "under a control arrangement savings would be limited to those resulting from the consolidation of the traffic solicitation forces of D&H and B&M with those of N&W" (B&M J. S., p. 8). As plainly shown on this record, however, Witness Wyer, rather than relying on any "assumption," based his conclusions on a thorough study of his own. This study was made under the supervision and with the cooperation of B&M personnel under circumstances which obviously presented every incentive for Witness Wyer to maximize his savings estimates (see N&W Brief, Sept. 25, 1967, pp. 15-22). B&M's own savings estimates were fully accepted by the Commission (330 I.C.C. at 834; 331 I.C.C. at 38), and B&M's belated attempts to discredit its own witness present no question meriting this Court's attention.

As is shown fully in N&W's appeal in No. 779 and the briefs filed with this Court, the Commission's error as to the terms prescribed for B&M was not in their inadequacy but in their excessiveness. B&M has experienced deficits every year since 1957, including a deficit of $1.5 million in 1966 (330 I.C.C. at 879). This fact alone makes the Commission's conclusion that B&M would have earnings of $400,000 annually as an independent railroad

incredible. In addition, B&M's experience in 1967 amply demonstrates that the value the Commission assigned to B&M is grossly inflated. In the first nine months of 1967, B&M has been operating at a deficit even greater than those experienced previously. For this period alone, B&M lost $2.9 million.

The appeal of the Erie-Lackawanna bondholders (No. 836) is equally lacking in merit. These appellants claim that special conditions must be imposed to prevent N&W from taking action in controlling EL which is detrimental to the interests of these bondholders. However, as the three-judge court below correctly recognized, the situation of which these bondholders complain is plainly the result of their own intransigence, and, in any event, no special conditions are required to protect their legitimate interests (N&W J. S., App. B., pp. 62-63).*

Affiliation of N&W and EL by way of merger would result in the assumption of EL's debt by N&W. The EL bondholders frustrated such an affiliation by refusing to cooperate in arranging a modification of EL's debt which would make merger possible. EL's management, recognizing that EL's massive debt was an insuperable obstacle to merger, asked its major bondholders, who included two of these appellants, to discuss modification of the debt in order to achieve merger. EL wrote that a choice must be made between two alternative forms of affiliation with N&W: (1) a control arrangement under which "N&W would not be required . . . to assume any direct obligations of Erie Lackawanna . . . " or (2) merger

*The bondholders assert that N&W will have an incentive for such action because "N&W is a more efficient earner than EL . . . " (J. S., p. 9). This record shows, however, that the N&W line which competes with the EL line does not produce pretax net income per dollar of revenues substantially different from the amount used by the Commission for EL (N&W Brf., September 25, 1967, p. 35 & n. 14; N&W Brf., September 5, 1967, p. 31 & n. 19), and the court below specifically rejected the theory upon which the bondholders rely (N&W J. S., App. B, n. 32, p. 49).

which would "require N&W to assume all of Erie Lackawanna's debt outstanding at the time of the merger." EL's management stated: "We believe that it would be impossible to obtain I.C.C. approval of Erie Lackawanna's petition for inclusion if Erie Lackawanna proposed that its debt be assumed directly by N&W without any modification being made therein . . . " (N&W Ex. 4, App. 2, pp. 1-3). The bondholders' response to this inquiry as to whether they would consent to some modification of the debt was: "*no, we'd rather have the company go bankrupt*" (N&W Ex. 4, App. 3, p. 7) (emphasis added).

Having thus rejected the attempt of EL's management to make possible affiliation by way of merger, the bondholders' belated attack upon the control arrangement actually prescribed does not merit this Court's consideration.

WHEREFORE: For the foregoing reasons, the judgment of the court below should be affirmed insofar as it dismissed the complaints of Boston and Maine Corporation and John Hancock Mutual Life Insurance Company, et al.

Respectfully submitted,

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No. 834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

READING COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

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MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

Appellees The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) respectfully submit that the final judgment of the District Court dismissing the complaint of Reading Company (Reading) was correct and should be summarily affirmed.

STATEMENT

Appellant Reading is controlled by The Chesapeake and Ohio Railway Company and The Baltimore and Ohio Railroad Company (C&O-B&O), who have also taken an appeal from the judgment of the District Court on grounds different from those pressed by Reading. On the prior appeal before this Court, Reading filed a joint brief with

C&O-B&O and certain other railroad appellants and presented no separate oral argument. In neither brief nor argument was it claimed that the Commission's order was defective because Reading had not been given an adequate opportunity to be heard on the injury that would be caused it by the Penn-Central merger or to press for interim protective conditions similar to those formulated for Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D&H) and Boston & Maine Corporation (B&M).

On this appeal Reading, which did not see fit even to mention the argument when the case was last here, claims that its very life depends upon the Commission giving it such protective conditions and that the Commission has unreasonably refused to hear its evidence to that effect.[1]

Reading has been a party to this case since its beginning in the Commission more than five years ago. During the extensive hearings that took place in 1962 and 1963 it presented no evidence, undertook no cross examination of witnesses and expressed no opposition to the merger. It made two requests only: that it be given standard routing conditions (which were duly given it by the Commission)

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[1]At the time of the prior appeal, The Central Railroad Company of New Jersey (CNJ) was, as Reading is now, controlled by C&O-B&O. CNJ filed a separate reply brief and made a separate oral argument, pressing on its own behalf alone the very contentions that Reading now presents. Since the prior appeal CNJ has been removed from C&O-B&O control by bankruptcy. It no longer argues that it needs protective conditions similar to those given E-L, D&H and B&M as protection from the Penn-Central merger.

Reading's statement that CNJ is negotiating with Penn and Central for such protection (J. S., p. 7) is not correct. The negotiations being conducted relate not to protection from the consequences of the Penn-Central merger as such, but solely to protection from any effects of the inclusion of the New York, New Haven and Hartford Railroad Company (New Haven) in the transaction. Reading has had a full hearing before the Commission on this subject, and has been granted protection. (See p. 5, *infra*)

and that Penn be required to dispose of its stock in Norfolk and Western Railway Company (N&W) (which Penn voluntarily agreed to do). Reading filed no brief before the Examiners.

In the course of the hearings the Commonwealth of Pennsylvania introduced into evidence a letter from the President of Reading responding to an inquiry of the Commonwealth about the effect of the proposed merger on Reading. The letter, a copy of which is attached to the Brief of Penn and Central on Final Hearing in the District Court filed with this Court (and which is discussed in the District Court's opinion (B&O J. S., pp. B-19-20)), stated that it was "possible" that there would be diverted a specified portion of Reading's traffic (comprising less than 3% of its carloadings) interchanged with Central. With respect to traffic interchanged with Penn the letter stated that "our study did not include traffic interchanged with the Pennsylvania since its merger with the New York Central would not appear to threaten this traffic. The Pennsylvania would now be handling it if this were physically feasible."[2]

In their report the Examiners found as to Reading and certain other carriers that the merger's "net effect will not be detrimental to such carriers individually or to their ability to provide a general transportation service to the public."

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[2]That Reading's position as to lack of substantial injury was no inadvertence or oversight is strongly suggested by the fact that CNJ, then under joint control with Reading and a participant in much of the traffic handled by Reading, took a very similar position. During the hearings there was introduced into evidence a letter statement by CNJ's President that that road had concluded "after careful consideration by our interested people" that CNJ would be strengthened rather than harmed by the merger and that "we have no grounds to oppose." A copy of this letter is also attached to our Brief on Final Hearing in the District Court.

(Proposed Report, at p. 305) Reading filed no exception to this finding.[3]

After the Commission's approval of the merger by its report and order of April 6, 1966, Reading filed a petition for reconsideration. It claimed that the indemnification provisions that the Commission had adopted for E-L, D&H and B&M were unlawful, but that if those roads were to be given such indemnification Reading should be also. It claimed also that the Commission's adoption of the Examiners' finding as to the lack of injury to Reading (to which finding Reading had, as we have noted, failed to except) should be withdrawn. The ground offered for the latter claim was that the finding might prejudice Reading in *other proceedings*—notably the N&W Inclusion case and the N&W-C&O Merger case—by precluding it from claiming in these proceedings injury from the merger of Penn and Central.

The Commission responded to Reading's contentions as follows: It directed, and subsequently held, a hearing on the indemnification provisions for E-L, D&H and B&M. In that hearing, which culminated in the Commission's report and order dated June 9, 1967 (330 I. C. C. 328), Reading was given an opportunity to show, and attempted to show, that the protective conditions prescribed for E-L D&H and B&M would inflict injury upon it. The Commission found that the evidence did not support Reading's contention that the conditions would cause it such injury. (330 I. C. C. at pp. 353-56) The Commission declined to reopen the record to hear evidence from Reading as to the injury that it would allegedly be caused by the Penn-Central merger as such, and apart from the protective conditions prescribed for other carriers. The Commission stated with regard to

[3]This omission is particularly significant in light of the fact that Reading did file exceptions with respect to other matters not relevant here.

Reading and C&O, B&O and CNJ, all of which had sought the same relief, that:

> "Their measured and deliberate silence during the hearing support the inference that they saw more to be gained thereby in their own system-building aspirations than would result from forceful opposition likely to arouse counter opposition.
>
> "Now, with the N&W-Nickel Plate merger and the C&O-B&O control transactions safely beyond challenge, and put into effect with remarkable success, petitioners have nothing to lose and perhaps much to gain by breaking their silence. Delay alone works in their favor. By requesting this 'second chance' to show adverse impact, petitioners are asking, in effect, that we begin anew to gather data and then practically to reappraise the entire merger. To this we cannot accede." (328 I. C. C. at p. 317)

The Commission did modify the form of its finding as to the lack of injury to Reading to state that such injury had not been shown (*id.* at p. 318), thereby obviating the specific objection that Reading had expressed to the prior finding. (See p. 4, *supra*)

In addition to the full hearing that Reading has thus received on the question whether the protective conditions for E-L, D&H and B&M will injure it, it has also had a full hearing on the question whether the inclusion of New Haven in Penn-Central will divert traffic from it and if so what protective conditions may be required, and has been granted certain protective conditions by the Commission.[4]

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[4]This hearing was initially provided for in Appendix A, paragraph 8 of the Commission's order of April 6, 1966. (See 327 I. C. C. at p. 553) The protective conditions formulated by the Commission for Reading as a result of this hearing are discussed at pages 123-33 of the Second Supplemental Report of the Commission, dated November 16, 1967, and issued November 21, 1967, copies of which have been supplied to this Court.

And in the future it will have the opportunity for a fu hearing on the question whether the granting of trackag rights by Penn-Central to D&H as contemplated by th Commission's order of April 6, 1966 (327 I. C. C. at p 528), will result in the diversion of any traffic from Read ing, and if so what protective conditions should be pre scribed.[5]

ARGUMENT

As the District Court held, "administrative proceed ings, especially of such complexity as this, would never en if parties remained free to take new positions at any tim and seek to support them with evidence that had been avail able all along." (B&O J. S., p. B-21) The Commissio did not act arbitrarily or blindly in rejecting Reading' proffer of evidence. It acted deliberately and against a background of extensive hearings, the largest record i Commission history, and an already extended delay in ef fectuating a transaction held to be in the public interest That Reading was guilty of laches cannot be questioned But it was guilty of more than laches. This was not a cas in which Reading merely slept on its rights. Rather it pur sued a deliberate and considered course of conduct tha casts a heavy doubt on the factual contention that it now advances—that the Penn-Central merger as such, and apart from the inclusion of the New Haven, will seriously injure it.

As stated above, Reading introduced no shred of evi dence of injury and made no claim of injury during the two-year period during which the original hearings in this case took place. It made no effort to amplify, explain or contradict evidence introduced by another party, consisting

[5]This hearing was provided for in the Commission's initial report of April 6, 1966. (See 327 I. C. C. at pp. 527-28)

of a letter written by the President of Reading, indicating that any injury to Reading from the merger would be insignificant. And it took no exception to the finding of the Examiners that the net effect of the merger "will not be detrimental" to Reading or to its "ability to provide a general transportation service to the public." (See pp. 3-4, *supra*)

Even in the petition for rehearing filed by Reading in June 1966, it took a position far short of that which it is now espousing. With respect to the protective conditions that the Commission had formulated for E-L, D&H and B&M its basic position was *not* that it needed comparable protection in order to survive, but rather that E-L, D&H and B&M should not receive such protection because the consequence would be injury to Reading.[6] Such a position is irreconcilable with Reading's present claim that the Penn-Central merger itself—apart from any protective conditions given other carriers—will injure Reading so drastically that it requires protective conditions in order to survive. And in attacking the Commission's finding that it would not be injured by the merger, Reading's expressed concern was *not* that reversal of that finding was essential to enable it thereafter to press for protective conditions but rather that the finding might have a collateral effect on its position in other cases—a concern that the Commission erased by modification of the form of the finding. (See p. 5, *supra*) Finally, it is surely noteworthy that on the prior hearing in this Court Reading's present contention, which if meritorious was no less relevant then than now, was not even mentioned.

Reading at various points in its brief states that its views have been altered by changed conditions, and that

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[6]Reading has had a full hearing on this contention and the Commission has rejected its position as unsupported by the facts. (See p. 4, *supra*)

this both explains and excuses its belated espousal of a new position. It asserts that "before 1965 Reading had every reason to expect that the adverse effects of the Penn-Central merger on the public served by Reading would be offset by its inclusion in C&O-B&O at or before the birth of Penn-Central" and that it is now apparent that this will not take place. (J. S., pp. 13-14) Reading makes no attempt to explain why it had "every reason" to indulge in any such expectation. The fact is that it had an excellent opportunity to seek inclusion in C&O-B&O at the time of the C&O-B&O Control case (317 I. C. C. 261 (1962)) but failed to take any steps to bring about such inclusion. More recently, it again had such an opportunity in the C&O-Western Maryland Control case. (328 I. C. C. 684 (1967)) But again, as the Commission there noted, "no representations were made by it with regard to its interests in the transaction." (328 I. C. C. at p. 706) It was only as of April 5, 1967, that Reading finally acted to petition for reconsideration of the Western Maryland Control order, requesting that the Commission direct its parents to give it financial support. That petition is pending for decision before the Commission. If it is granted Reading has achieved its goal. If it is denied Reading has available the usual judicial remedies.[7]

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[7]Reading's suggestion (J. S., p. 22) that the Commission acted with an uneven hand by imposing conditions for the Lehigh Valley Railroad, which did not appear in the Penn-Central proceeding, while refusing to hear Reading is without merit. Lehigh, as Reading itself points out, is a subsidiary of Penn, and thus might reasonably have been thought to be in no position adequately to represent its own separate interests. Moreover, Reading ignores the nature of the conditions imposed with respect to Lehigh. Those conditions basically imposed an obligation on Penn-Central to offer that road successively to C&O and to N&W, and to give it financial assistance in the meantime. (See 327 I. C. C. at pp. 554-55) If Reading is entitled to financial assistance, the Commission is in a position to impose an obligation on its parents to provide that assistance as part of its order in the Western Maryland Control case.

We submit that this claim of "changed conditions" is a mere afterthought. It was not even mentioned in the 27-page petition for reconsideration of the Commission's April 6, 1966, order filed by Reading in June 1966, despite the fact that the events that Reading now claims to have changed its earlier expectations had taken place substantially before that time. Nor was it mentioned in the complaint, brief or oral argument of Reading in the District Court in September 1966, or in its briefs or oral argument in this Court in January 1967. Under these circumstances it is patently unpersuasive as an ex post facto rationalization of Reading's belated change of position.[8]

The authorities that Reading cites in its brief do not support its position that the Commission was required as a matter of law to reopen the record to receive and consider evidence that Reading proferred for the first time when the proceedings were more than four years old and after the Commission had rendered its decision. The question whether the Commission erred must be determined on the particular facts here involved, not by reference to decisions in cases involving different facts or by reliance upon generalized and abstract propositions. Thus the assertion that "the clear statutory duty of the Commission is to consider the effects of this merger upon *every* railroad involved regardless of whatever position may be taken by the railroad on

[8]Reading also argues that it did not take the trouble to submit evidence in the original proceedings because "such evidence would not then have been relevant" because "it was unaware of the fact that the Commission would fashion special conditions to protect and indemnify small railroads pending inclusion in a large system." (J. S., p. 16) This argument cannot be taken seriously. It amounts to a contention that Reading was justifiably excused from introducing evidence of injury to it because it believed that the Commission would take no action to mitigate that injury. It is hardly credible that Reading actually proceeded on any assumption that the Commission would inevitably disregard any valid showing that it might make.

the record" (J. S., p. 13) does not justify the conclusion that a litigant which sits back while there is introduced into the record evidence in the form of a statement of its own chief executive indicating a lack of substantial adverse effect and which deliberately withholds evidence claimed to show the contrary until after the agency has made its decision is then entitled to insist that the agency committed an error of law because it did not conduct an independent inquiry and force it to produce the evidence. See *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S. 143, 155 (1946); *FPC* v. *Colorado Interstate Gas Co.*, 348 U. S. 492 (1955); *United States* v. *L. A. Tucker Truck Lines*, 344 U. S. 33 (1952).[9]

In the District Court Reading relied strongly on *Udall* v. *FPC*, 387 U. S. 428 (1967). That reliance is repeated, albeit to a lesser extent, here. The *Udall* case turned on considerations altogether different from those here presented. There the Court set aside the agency order on the ground that the basic issue (that of public as opposed to private development of the power project in question) had not been considered or explored in the administrative proceeding. In this case there has been no failure by the Commission to explore and consider all facets of the public inter-

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[9]Compare this Court's statement in United States v. Northern Pacific R. Co., 288 U. S. 490, 494 (1933):

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order."

est, including the interests of Reading and its "ability to provide a general transportation service to the public." In the *Udall* case the Secretary of the Interior took no action comparable to that of Reading's here in supplying material for the administrative record inconsistent with the position that it sought later to espouse. In *Udall* the Secretary urged postponement before the administrative hearings were concluded and again before the Examiner had rendered his decision. Here, in contrast, Reading stood by until after the Commission had made its decision, failing even to except to an Examiners' finding that the merger would not injure it. And finally, in *Udall* there was no basis for concluding that the Secretary had, for tactical reasons and in his own private interest, intentionally adopted first one position and then a second one.

The ruling of the Commission and the Court below as to Reading enunciated no broad general principle of law. It was based on a detailed and particularized appraisal of Reading's conduct and the probable motivations for that conduct, and based also on the existence of record evidence that indicated that the fears that Reading now professes are greatly exaggerated. The duty of the Interstate Commerce Commission to protect the public interest can be discharged only if it is permitted to act within a framework of workable procedures. If the courts deny the Commission the discretion to decline to hear, after it has completed hearings and rendered its decision, claims and evidence that could and should have been timely presented, the administrative process will literally be incapable of final resolution.

Reading's belated insistence that it must have protective conditions pending inclusion in or financial assistance from a larger rail system is singularly unpersuasive in view of its relationship to C&O-B&O. For prac-

tical purposes Reading is now operated as a part of the C&O-B&O system. In the Western Maryland Control case, 328 I.C.C. at pp. 708-09, the Commission found that through stock ownership and interlocking directors, officers and employees B&O exercises "a substantial degree of managerial control" over Reading. There is no justification for the attempt of Reading to impose upon Penn-Central burdens that result from the failure of C&O-B&O and Reading to resolve problems that are peculiarly their responsibility. There is likewise no justification for the suggestion that in the absence of protective conditions the existence of Reading will be imperiled. As the District Court aptly observed:

> "Indeed it is still exceedingly hard to believe that B&O will see the roads affording it access to the metropolitan New York area disappear, although it naturally will do everything possible to exploit its lack of obligation to include Reading and CNJ in its own system both to minimize their commuter burden and to forward the N&W-C&O-B&O merger." (B&O J. S., p. B-22)

CONCLUSION

For all the foregoing reasons, the judgment of the District Court dismissing the complaint of Reading was clearly correct and should be summarily affirmed.

Respectfully submitted,

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November 27, 1967

No. 835

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE NEW YORK CENTRAL RAILROAD COMPANY TO AFFIRM

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Appellees The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) respectfully submit that the final judgment of the District Court dismissing the complaints of appellants City of Scranton and Milton J. Shapp was correct and should be summarily affirmed.

STATEMENT

Appellants Shapp and Scranton first sued to block the Penn-Central merger in September 1966 in the Southern District of New York. The District Court, in its decision of October 1966 (259 F. Supp. at p. 972), held that their arguments were so lacking in substance that they had no reasonable prospect of success upon a final hearing. In the

ensuing appeal to this Court both Shapp and Scranton filed extensive briefs in support of their position, and both were permitted to participate in oral argument. Although the Court's opinion did not pass upon their contentions, four Justices expressed concurrence in the District Court's view of the contentions in the following terms (386 U. S. at p. 464):

> "Certainly, there is no tolerable basis for our attacking the merger on its merits. To do so would be to substitute our judgment for that of the Commission on grounds which, to say the least, are speculative and based upon the claimed superiority of competing economic considerations. We are not at liberty to do this, and if we were free to do so, it would require a high degree of intrepidity on such a basis to overturn a result which, even if we assume its imperfections, generally incorporates a significant step in a direction which national policy has sought for several generations. This is Congress' responsibility, and the task, not of the courts, but of Congress' designated instrumentality, the ICC. The national need to refurbish and revitalize rail communications is urgent—some say of desperate urgency. The ICC has found that the merger here will result in economies and efficiencies aggregating $80,000,000 annually by the eighth year, which it asserts will enable the roads to effect the badly needed modernization of their facilities."

Since that time the efforts of Shapp and Scranton have been bent toward avoiding at all costs a final hearing on the merits in the jurisdiction that they themselves originally selected. After having given them every opportunity to pursue their claims, and with ample prior warning of the consequences of failing to do so, the District Court ultimately dis-

missed their complaints with prejudice for failure to comply with the Court's procedural directives, adding that it found no merit in the complaints.

The action of the District Court of which appellants complain was taken under the following circumstances:

On June 12, 1967, the Interstate Commerce Commission issued an order (dated June 9, 1967) promulgating final protective conditions for Erie-Lackawanna Railroad Company (E-L), The Delaware & Hudson Railroad Corporation (D&H) and Boston & Maine Corporation (B&M) pending their inclusion in a larger rail system, and reaffirming its prior orders authorizing prompt consummation of the Penn-Central merger. (330 I. C. C. 328) On the same date the Commission issued its order in the Norfolk and Western Railway Company (N&W) Inclusion case. (330 I. C. C. 780)

On June 19, 1967, Penn and Central moved the New York District Court, which had earlier enjoined the consummation of their merger pending the completion of the proceedings directed by this Court in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967), for an order directing all plaintiffs to file amended complaints setting forth their surviving contentions in light of the Commission's action, so that the entire matter could proceed expeditiously and efficiently to find determination in accordance with this Court's expectation.

On June 26, 1967, the day prior to that fixed for responses to the Penn and Central motion, the Borough of Moosic, Pennsylvania, filed a complaint in the Middle District of Pennsylvania challenging both the Penn-Central merger and the Inclusion order. Moosic, a suburb of Scranton, had never prior thereto participated, either in the Commission or the courts, in the more than five years of litigation over the Penn-Central merger. Insofar as it attacked that merger, Moosic's complaint was substantially identical to

those that had been filed by Shapp and Scranton in New York some nine months previously. And among the counsel representing Moosic were both counsel who had argued in behalf of Shapp and Scranton in this Court on appeal from the prior New York decision.

On June 27 Shapp and Scranton filed a statement of opposition to the Penn and Central motion, claiming that the Court could not properly require them to file supplemental complaints and asserting their intention to withdraw from the New York proceeding and intervene in the Moosic case. A number of other plaintiffs also opposed the motion. On July 3, the District Court issued an opinion overruling the objections and granting the motion, expressing the view that:

> "The idea that litigants challenging an order of a federal administrative agency may invoke the jurisdiction of one federal court, require it to expend its energies in becoming familiar with the subject matter, obtain interlocutory relief against enforcement of the order, and then take their grievances to another federal court which they consider may be more favorable while their complaints remain pending for final disposition, does not commend itself in general; and surely this case, where expedition is so important, will be the last one in which to countenance proceedings of that sort."

The Court directed that any plaintiff failing to file a supplemental complaint by July 17, 1967, would in the absence of a showing of good cause suffer dismissal with prejudice.

On July 13, 1967, the Pennsylvania court in which the Moosic suit had been brought (and where Shapp and Scranton had intervened) issued an order staying all proceedings in that court until after the date set by the New York Court for final hearing in the Penn-Central merger case. With

respect to the appellants here the Pennsylvania court specifically warned that "* * * consequences may be applicable to Mr. Shapp and the City of Scranton if they fail to press their claims in the New York federal court since they have been parties to that proceeding for almost a year."

By July 17, all of the New York plaintiffs who had objected to the Penn and Central motion except Shapp and Scranton had filed supplemental complaints in the New York Court.[1] On that date Shapp and Scranton filed a motion to stay all proceedings in the New York Court in favor of the Moosic suit (despite the fact that the latter suit had already been stayed in favor of the New York proceeding) and in the alternative for dismissal of their complaints without prejudice to enable them to proceed in the Moosic case. On July 26, the New York Court denied the motion, stating that:

> "The movants have shown no sufficient cause why, having invoked the jurisdiction of this Court where this litigation has been centered, they should now be allowed to present the self-same issues to another district court which has thus far had no occasion to occupy itself with their problems."

The Court gave Shapp and Scranton still another opportunity to comply with its directive, by extending the time for them to file supplemental complaints or suffer dismissal until August 2, 1967. The Court also stated that it would grant Moosic leave to intervene at any time prior to that date.

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[1]These were N&W, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Western Maryland Railway Company and Reading Company. E-L and D&H, which had not objected to the motion, also filed supplemental complaints. Each of these plaintiffs thereafter had the opportunity to, and did, participate fully in briefing and oral argument before the District Court—N&W, E-L and D&H in both the Penn-Central and Inclusion cases.

Shapp and Scranton—and Moosic as well—declined to take advatnage of the Court's invitation.[2] On September 19 the Court heard oral argument in the Penn-Central case, and on September 28 in the N&W Inclusion case. And on October 19 the Court, in a final decision rejecting challenges to the Commission's Penn-Central Merger order from a variety of sources and also affirming the Commission's Inclusion order, directed a dismissal of Shapp's and Scranton's complaints with prejudice.

ARGUMENT

When the Commission issued its orders dated June 9, 1967, in this case and in the N&W Inclusion case, there immediately arose, as the Court below noted, "the threat that these related orders would become the subject of litigation in six or more different district courts * * *." (B&O J. S., p. B-4). Such a result would have been wholly inconsistent with this Court's recognition, expressed in *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372, 392 (1967), of the importance of an expeditious determination of these matters. It was avoided because of what the District Court characterized as the "sober second thought of most counsel" (B&O J. S., p. B-4) and because of the procedural steps taken by courts in three different judicial circuits whereby the entire litigation was focused in the Southern District of New York.[3] Appellants are here be-

[2]On August 2, 1967, Shapp and Scranton filed in the New York Court instead of supplemental complaints a document entitled "Formal Objections to Order to Plead or To Suffer Dismissal With Prejudice."

[3]In addition to the already described steps taken by the New York and Pennsylvania courts, the District Court for the Western District of Virginia, where N&W had brought suit attacking the Inclusion order, found that "the issues raised in this action should be litigated in the United States District Court for the Southern District of New York" and set a schedule for proceedings which was designed to—and which did—result in the action being so litigated.

cause they alone, of all the parties to this complex litigation, refused to accede to and comply with the court orders designed to assure expeditious review in this manner. Their argument that the District Court was powerless, after they had invoked its jurisdiction and found it unreceptive to their position on the merits, to prevent them from withdrawing from that jurisdiction in order to sue in another court finds support in neither reason nor authority.

I. The District Court Did Not Lack Authority to Direct Appellants to File Supplemental Complaints

Appellants' claim of error as to the action of the District Court in requiring them to proceed or be dismissed with prejudice is made both in terms of lack of power and abuse of discretion. So far as the question of power is concerned the appellants' argument is that the complaints that they filed in New York in September 1966 were directed against the Commission's orders dated April 6 and September 16, 1966; that these orders were wholly superseded by the Commission's order dated June 9, 1967; and that their original suits thereupon became moot so that the Court's order was not one merely requiring them to proceed with a suit already brought, but was a wrongful attempt to compel them to bring an entirely new suit.

This contention misconceives the nature and relationship of the Commission's three successive reports and orders in this case. It is the report and order of April 6, 1966 (327 I. C. C. 475), and only that report and order, that passed on the basic objections with which appellants challenge the propriety of the merger, that made the fundamental determination of public interest required by the statute and that provided the approval and authorization of the merger of Central into Penn and the acquisition by Penn through the merger of control of Central's subsidiaries and affiliates

and trackage and other rights of Central in other carriers. Again it was the April 6, 1966, report and order alone that passed on and gave the authorization for the stock issues and related transactions required by the plan of merger, an authorization without which the merger could not take place. The subsequent reports and orders dated September 16, 1966 (328 I. C. C. 304), and June 9, 1967 (330 I. C. C. 328), merely supplemented, and did not supersede, the basic report and order. Thus the September order does not even repeat the authorizations of the merger made in the April order, but rather deals solely with events occurring, and applications and arguments made, following entry of the original order. The June 1967 order states on its face that it is a "Supplemental Order on Reconsideration." Neither it nor the supplemental report to which it is appended is addressed to the sole contention made by Shapp and Scranton which is not that the Penn-Central merger should be deferred pending resolution of certain contingencies but that it should never be permitted to take place, or to the many arguments offered in support of that contention.

It is particularly curious to find counsel for Shapp and Scranton contending that the 1966 Commission orders are moot in light of their actions in the suit filed by the Borough of Moosic in the Middle District of Pennsylvania. The complaint in that case, which was not filed until June 26, 1967, well after the time appellants now claim the 1966 orders of the Commission became moot, recites in its first paragraph that "This is an action to enjoin, annul, suspend, or set aside orders of the Interstate Commerce Commission dated April 6, 1966, September 16, 1966, and June 9, 1967 * * *." The complaint is signed by counsel for both Shapp and Scranton in the New York Court, acting as counsel for Moosic. And Shapp and Scranton, in intervening in the Moosic action, adopted as their own this

allegation as well as substantially all the other allegations of the Moosic complaint.

For these reasons the District Court was plainly correct in holding in its opinion of July 3, 1967, that "the subject of the complaints [filed in September 1966] was the Commission's approval of the merger as it then stood or as it might stand in the future," and that these complaints were not mooted by the supplemental order of the Commission in June 1967.[4] And given the correctness of this ruling, there can be no doubt of the District Court's power to implement it by requiring appellants to proceed or suffer dismissal with prejudice (*In re Georgia Power Company*, 89 F.2d 218 (5th Cir.), *cert. denied*, 302 U.S. 692 (1937); *Agnew* v. *Moody*, 330 F.2d 868 (9th Cir.), *cert. denied*, 379 U. S. 867 (1964); F. R. Civ. P. 41(b)), particularly when appellants' obvious motive was to avoid a forum that had expressed an unfavorable opinion as to the merits of their position (*Southern Maryland Agricultural Ass'n* v. *United States*, 16 F.R.D. 100 (D. Md. 1954)).

II. The District Court Did Not Abuse Its Discretion In Dismissing Appellants' Complaints With Prejudice When They Refused to Comply With Its Valid Procedural Order

Appellants urge that even if their complaints in the New York Court were not moot, that Court abused its discretion in declining to permit them to dismiss those complaints without prejudice. The contention is that appellants should have

[4] Sierra Pacific Power Co. v. FPC, 223 F. 2d 605, 609 (D. C. Cir. 1955) and its sequels, cited by appellants, are not in point. In that case the court had annulled and set aside a Federal Power Commission order, and thus there was no question but that the suit challenging that order had ended. Here, in contrast, the April and September 1966 orders of the Commission were not annulled or set aside, but rather were only temporarily enjoined pending the resolution of certain contingencies which were resolved by the Commission's orders dated June 9, 1967.

been permitted to depart from New York in order to litigate in Pennsylvania because the Penn-Central and Inclusion orders were "inextricably interwoven" and their complaints in the Moosic litigation in Pennsylvania attacked both orders. (J. S., p. 4)

Appellants cannot claim that they were prevented, or indeed that any court or any party ever even sought to prevent them, from challenging both the Penn-Central and the Inclusion orders in New York. In fact the New York and Pennsylvania courts, and the parties supporting the orders, expressly invited appellants to challenge both orders in New York, and the defendant United States offered appropriate waivers of venue to facilitate their doing so. And had appellants wished to file in New York complaints precisely like their intervening complaints in Pennsylvania, which challenged both the Merger order and the Inclusion order in a single document, there was nothing to prevent their taking such action.

Appellants' complaint thus comes down to the fact that the New York Court established separate briefing schedules and argument dates for the two cases. This action in no sense implied a determination that the two cases were not closely related. The Court no less than appellants was aware of that relationship. Indeed, it was its awareness—and the awareness of the Pennsylvania and Virginia courts—of the relationship that caused them each to take action to facilitate determination of both cases in the forum where the litigation had begun and which had the most familiarity with its subject matter. The fixing of dates for briefs and argument was a housekeeping detail. The schedule as established was not designed to preclude any party from asserting in whatever detail it chose, on brief and in oral argument, any alleged relationship between the Merger and the Inclusion cases, nor the Court from exploring any such

relationship. It proved not to prevent any other party or the Court from dealing with the relationship, and there is no reason to believe it would have prevented appellants from doing so.

That appellants' present position is one dictated by exigency rather than conviction is strongly suggested by comparing it with their position before the Commission as recently as May 9, 1967. At that time there was pending before the Commission a petition of Reading Company to consolidate for decision four railroad unification cases, including the Penn-Central Merger and N&W Inclusion proceedings. In response to that petition, appellant Scranton urged that such a consolidation "standing alone, would both continue *as well as aggravate* the prejudice to City of Scranton" (emphasis added), and expressly asked that unless the Commission were willing to grant further evidentiary hearings in all the cases, the petition for consolidation for decision be denied. (See Reply and Petition of Scranton in Finance Dockets No. 21510, 21989, 23178 and 23832, *et al.*, filed May 9, 1967, pp. 2, 28) It is difficult to understand how appellants, having believed a consolidation for decision in the Commission to be prejudicial to their interests, can claim that a similar consolidation in the District Court was vital to the protection of those interests.

Under these circumstances the action of the District Court dismissing appellants' complaints with prejudice by reason of their failure to comply with the Court's order to supplement their pleadings was, far from being an abuse of discretion, plainly correct.

III. The District Court Correctly Concluded That the Complaints of Shapp and Scranton Are Without Merit

The District Court unanimously concluded that apart from the procedural grounds discussed above, dismissal of the Shapp and Scranton complaints was justified by the fact

that they were without merit. In reaching this conclusion, the Court was able to consider extensive briefs filed by Shapp and Scranton in support of their claims in September 1966. The questions presented by the complaints raised solely issues of law.[5] Because a case of this kind does not involve a trial *de novo* the issues may properly be determined by summary judgment and no findings of fact are required. (*National Broadcasting Co.* v. *United States,* 47 F. Supp. 940 (S. D. N. Y. 1942), *aff'd,* 319 U. S. 190 (1943))

Throughout this proceeding, including the prior hearing in this Court, appellants have argued that certain findings of the Commission are not supported by substantial evidence. These arguments are largely addressed to the Commission's findings on the financial position of Penn and Central and their prospects for profitable operation. Analysis of these arguments shows that they are either predicated on a misreading of the Commission's reports or are directed in fact not to the absence of substantial evidence, but rather to the weight that is to be given to, or the inferences that are to be drawn from, the evidence.

The Commission did not, as appellants suggest (J. S., p. 15), rest its decision on the ground that Penn and Central were "failing" companies. On the contrary the Commission expressly stated that "the provisions of section 5(2) of the act do not require an applicant to show penury or danger of imminent bankruptcy before a transaction it proposes can be approved." (327 I. C. C. at p. 494) The Commission did find that "Since 1952, applicants' rates of return have been too low to generate confidence in their financial soundness, to maintain credit, and to raise funds

[5]This was no less true of the questions framed in terms of whether the evidence supporting particular findings of the Commission was "substantial" than of any of the other questions raised. (Dredge Corp. v. Penny, 338 F. 2d 456 (9th Cir. 1964); Marion County Coop. Ass'n v. Carnation Co., 214 F. 2d 557 (8th Cir. 1954))

necessary for the discharge of their public duties" (*id.* at p. 500), and this finding was fully supported by undisputed evidence.

Appellants' assertion that the Commission's decision rests on assumptions that Penn and Central "will face a continued decline in output" and that "the record shows no reason for optimism on applicants' traffic level" (J. S., p. 15) is not an accurate description of the aspect of the Commission's decision that appellants criticize. What the Commission in fact did was to reject as unsound appellants' argument that it should be assumed that in the future there would be a substantial improvement in the traffic position of the applicants which would necessarily lead to a substantial improvement in the financial results of their transportation operations—an argument that appellants rested on certain projections relating to the rate of increase in economic activity in general which it was asserted would in turn lead to increased traffic and increased profits for the applicants.

In rejecting this argument the Commission found that even accepting appellants' projections as to the general level of economic activity "there is no assurance in this record that the applicants' prosperity will keep pace with that of the nation as a whole. Historically they have failed to do so." (327 I. C. C. at p. 495) It found that there was no warrant for assuming that "improved 1964 and 1965 incomes establish an unquestionable trend toward permanent improvement in applicants' finances." (*Id.* at pp. 495-96) It further found that because it was making a decision that would have long term consequences it could not reasonably close its eyes "to the very real danger that our economy may not always be as active and healthy as it is today" since "even an expanding economy pauses occasionally to consolidate the gains of past growth." (*Id.* at pp. 497-98) It noted that railroading is "a cyclically sensitive industry"

and that railroads because of their large fixed plant and relatively constant costs "are among the industries first to suffer loss of income in periods of business recession." (*Id.* at p. 498)

That the Commission's decision did not depend on any unwarranted assumptions of pessimism is shown by the fact it declared that "it is not a legal impediment that the merger candidates find business good" (*id.* at p. 498), and stated that the matter requiring more serious consideration than the increase in income of Penn and Central after the close of the hearings was "whether the return they receive for capital expended is sufficiently attractive to insure their continued efforts toward improving railroad service, providing jobs for their employees, and discharging their transportation obligations to the public" (*id.* at p. 499).

Appellants have emphasized the improvement in the financial condition of the two railroads in 1964 and 1965 and assert that this improvement should be given decisive weight. The Commission was aware of this improvement but declined to regard it as controlling.[6] The Commission pointed out that even in 1964 and 1965 the return earned on investment by the two roads was low as compared with that earned by other industrial enterprises and even lower than

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[6]See also the opinion of the District Court (B&O J.S., p. B-9 n. 6): "The criticism that the Commission did not give adequate weight to the improved earnings of PRR and NYC during the course of the merger proceedings has been shattered by the results for the first half of 1967."

In the first nine months of 1967, Central has reported a small net railway operating income *deficit*, as compared to net railway operating income of $42,115,933 during the comparable 1966 period. Penn in the first three quarters of 1967 had net railway operating income of $6,021,867, as compared with $42,016,036 of such income during the first three quarters of 1966. These sharp declines have taken place in the face of an increase in the Gross National Product, as reported by the United States Department of Commerce on a seasonally adjusted basis at the close of the third quarters in 1966 and 1967, from $748,800,000,000 to $791,200,000,000.

the return on Government bonds. (327 I. C. C. at pp. 498-501)

Appellants have also asserted that the Commission accepted erroneous projections of traffic volume for the future, pointing out that whereas in those projections it was estimated that Penn and Central freight traffic would amount to 69,000,000 ton miles in 1965, the witness Keyserling (counsel for Scranton on the prior appeal) correctly estimated that traffic volume would rise to 89,000,000 ton miles in that year. The validity of the Commission's findings that the proposed merger will be in the public interest does not turn upon the accuracy of a traffic projection for one year. Indeed it does not depend upon acceptance of the traffic projections for a longer period of time made by the two applicant railroads nor does it require the rejection of the conflicting projections offered by the opponents of the merger. The Commission made this plain in its initial report where, as noted above, it observed that even if it accepted the economic projections of the Department of Justice and certain Pennsylvania communities including Scranton "there is no assurance in this record that the applicants' prosperity will keep pace with that of the nation as a whole. Historically they have failed to do so." (327 I. C. C. at p. 495) The Commission's findings with respect to the financial prospects of the two applicant railroads were based primarily on undisputed facts with respect to their rates of return on investment and, as we have pointed out, the Commission found that even in 1964 and 1965 those rates of return were so low as to create doubts about the capacity of the two carriers to continue to provide the kind of common carrier service that the public interest requires.

Appellants have asserted that in approving the merger the Commission acted to curtail overall railroad capacity

in line with the allegedly erroneous traffic projections referred to above. (See *e.g.*, the Brief filed by Shapp in this Court on the prior appeal, p. 19) The Commission in fact found that the merger would improve the applicants' ability both to provide transportation services needed by a growing economy and to perform their transportation obligations during periods of economic pause or recession. The merger, the Commission said, would "open the way for the development of a modernized railroad system trimmed of unnecessary plant, unencumbered by service obligations no longer responsive to the public needs, and free and able to grow as and where the Nation's transportation requirements dictate. Mergers are not for shrinkage any more than the pruning of a fruit tree is for reducing the yield of fruit." (327 I. C. C. at p. 496) Contrary to appellant's assertions the Commission found that the merger would create new capacity (*id.* at pp. 489-92), would "motivate the unified company to accelerate investments in transportation property and continually modernize plant and equipment" (*id.* at pp. 501-02), and would prevent substantial disinvestment of funds which would impair the applicants' ability to modernize and improve services essential to economic growth (*id.* at pp. 499-501).

The arguments with which appellants have attacked the Commission's approval of the merger as not based on substantial evidence are, as the District Court recognized, in reality essentially arguments that the Commission erred in deciding questions of economic policy that are committed to its judgment. Thus appellants have in various of their briefs asserted that the Commission adopted a "doom and gloom philosophy" (Scranton S. D. N. Y. Brief, Sept. 1966, p. 3); that the merger is "in conflict with the National Policy of maximum employment, production and purchasing power * * *" (*id.* at p. 8); that the present state of the

country's economy does not "warrant a contraction of railroad facilities" (Shapp S. D. N. Y. Brief, Sept. 1966, p. 19); that the Commission has failed to appreciate "the transportation needs of a *big* country" (Keyserling Affidavit on Application for Stay, p. 2); and that the Commission was led astray by a "concept of boom and bust" (*id.* at p. 5). These and similar arguments do not demonstrate either that the Commission's findings are insufficient or that they are unsupported by substantial evidence. They are arguments that simply quarrel with the Commission's appraisal of complex questions of public policy and transportation economics that Congress has authorized it to decide. This Court has held that within this area of judgment the wisdom and experience of the Commission and not of the courts must determine whether a proposed merger is consistent with the public interest. (*McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87-88 (1944); *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173, 188 (1959))

The final "question of fact" mentioned by Shapp and Scranton is whether "the merger will benefit rather than harm Pennsylvania." (J. S., p. 15). The short answer is that the Commonwealth of Pennsylvania does not need or seek the representation of Shapp and Scranton on this score. The Commonwealth itself appeared on the prior appeal in this case to argue that it will benefit from the merger and that the Commission's orders should be sustained. Under these circumstances appellants have no right or standing to assert injury to Pennsylvania.[7]

The allegations that appellants characterize as presenting "issues of law" are equally unmeritorious. Appellants assert that the Commission adopted an erroneous definition

[7]In its initial report the Commission summarized the evidence that supports its finding that the merger "will benefit rather than harm the Commonwealth." (327 I. C. C. at pp. 492-93)

of the "public interest" and as a result ignored or did not adequately consider certain of their objections to the merger. This assertion rests on a passage in the proposed report of the Examiners which it is contended the Commission adopted and affirmed. (Proposed Report, at pp. 280-83; 327 I. C. C. at pp. 481-82) In that passage the Examiners adopted, as they were obliged to do, the definition of the term "public interest" in Section 5(2)(b) that was enunciated by this Court in *United States* v. *Lowden,* 308 U. S. 225, 230 (1939), and *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25 (1932). In compliance with that definition the Examiners held that in appraising "the public interest" the Commission was limited to considering matters that related to the adequacy and efficiency of transportation services and facilities. The Examiners made this holding in rejecting arguments that the merger should be disapproved (1) because it might reduce tax receipts and thus hamper the conduct of public functions by certain governmental bodies and (2) because by diminishing employment to railroad workers residing in certain areas it might have repercussions on business supplying goods and services to such workers. (Proposed Report, at p. 281) The Examiners said (*id.* at p. 282):

> "The Interstate Commerce Commission, while having broad jurisdiction in the regulation of railroads generally, is confined by its statutory authority in considering 'the public interest' as it applies to the 'adequacy of a transportation service', and it has no authority to guarantee a certain level of employment at a particular location, nor to gauge or consider the effect which divestment by railroads at a given point would have upon the taxing structure of particular states, counties, communities, or other political subdivisions.

> "It is eminently clear that neither the taxing structure, the level of employment in any given area, nor other arguments running to these essential questions bear any relationships to transportation, nor can we find any provisions of the act or in its legislative history that permits us to measure the impact of the proposed merger in relationship to such effects upon economic political or geographic areas or individual businesses located therein."

The Examiners committed no error of law in this holding. Appellants have never disputed that the holding was fully justified by the decisions in *Lowden* and *New York Central Securities Corp., supra.* Their argument rather has been that since these cases were decided the Transportation Act of 1940 and certain other federal statutes have amended and extended the public interest standard of Section 5(2)(b). There is nothing in this contention. The cases decided under Section 5(2)(b) since the Transportation Act of 1940 was passed make it plain that the Act did not change in any respect the public interest standard of Section 5(2)(b). (See *Brotherhood of Maint. of Way Employees* v. *United States,* 221 F. Supp. 19, 25 (E. D. Mich.), *aff'd per curiam,* 375 U. S. 216 (1963); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 83 (1944); *Schwabacher* v. *United States,* 334 U. S. 182, 193 (1948))
Indeed, the Supreme Court has said that the 1940 Act changed "the means" but not "the end" which the Commission is authorized to achieve. (*County of Marin* v. *United States,* 356 U. S. 412, 416 (1958))

No elaborate discussion is necessary to dispose of the suggestion that appellants have made that the Employment Act of 1946, the Area Development Act of 1961, the Manpower Development and Training Act of 1962, the Economic Opportunity Act of 1964, the Appalachian Regional

Development Act of 1965 and the Mass Transportation Act of 1966, considered collectively or individually, amended the public interest standard of Section 5(2)(b) or otherwise extended the powers of the Interstate Commerce Commission. That suggestion cannot survive even a cursory reading of the provisions of those statutes.

The Commission's consideration of the interests of areas and communities complied with the standards of Section 5(2)(b). Both the Examiners and the Commission considered the effects of the proposed merger on the adequacy and the efficiency of the transportation services and facilities that would be available to particular areas, states and communities and made adequate and appropriate findings on those effects. (See Proposed Report, at pp. 229-86 and particularly pp. 283-86; 327 I. C. C. at pp. 491-93) The Commission did not commit any error of law by thus confining its attention to the transportation aspects of the proposed merger.

In the prior appeal in this Court Shapp argued at length (Shapp Brief, pp. 26-30), and Scranton appeared also to assert (Scranton Brief, p. 12), that the Commission erred in applying a "broad 'public benefits' test," rather than the statutory "public interest" test in directing an opportunity for inclusion of the New Haven in the merged Penn-Central. In making this argument, these appellants seized on the fact that the Commission in discussing the merits and timing of the merger both in its original report and its report on reconsideration on occasion referred to "public benefits" and "benefits to the public" rather than "public interest." (See, *e. g.*, 328 I. C. C. at p. 306) It is apparent, however, from a reading of the pertinent passages that in employing the former terms the Commission was in no way indicating its adherence to a standard different from the statutory standard.

In connection with their argument on the prior appeal, Shapp and Scranton urged that the Commission, in finding that the opportunity that the merger offered for a solution of the problems of the New Haven was a factor militating strongly toward its approval, *must* have applied a "public benefits" standard that was different from the "public interest" standard. (Shapp Brief, pp. 26-30; Scranton Brief, pp. 12-13) The premise of this argument appears to have been that the Commission could not properly have found inclusion of the passenger and freight operations of the New Haven in the Penn-Central system to be in the public interest because that inclusion would allegedly require "citizens of states lying between the Mississippi and Hudson Rivers to subsidize the passenger operations in New England" in the teeth of a "firm Congressional policy", claimed to be expressed in the Transportation Act of 1958, "that passenger service is not to be subsidized by the shippers of freight." (Shapp Brief, pp. 28-30) This argument is wholly without merit. Even assuming the correctness of appellants' characterization of the policy of the Transportation Act of 1958, an inclusion of New Haven's operations in the Penn-Central system would in no way be inconsistent with that policy. The merged Company, no less than the present New Haven, would be free to take advantage of the Transportation Act of 1958 to the extent authorized by the terms of that statute, and the Commission expressly emphasized that the merger savings should not and would not be permitted to be a subsidy for the New Haven passenger operations. (327 I. C. C. at pp. 523-25)

Appellants raise as another "issue of law" a contention that the Commission did not make adequate findings on the competitive consequences of the merger and did not properly appraise the merger in the light of the policy of the antitrust laws. This argument does not require extensive dis-

cussion. Both the Examiners in their proposed report and the Commission in its reports considered in detail the competitive consequences of the merger and in the course of that consideration gave appropriate weight to the policies of the antitrust laws and to the concepts that have been developed in antitrust decisions for measuring the effect of mergers on competition. (See Proposed Report, at pp. 160-75, 176-95, and particularly pp. 419-39; 327 I. C. C. at pp. 502-20; 328 I. C. C. at pp. 309-10)

Appellants have asserted that there is a distinction between "carrier competition" and "market competition," described as competition that exists when two carriers serve a common consuming market from different points of origin, and argue that the Commission failed to consider "market competition." (Shapp Brief on prior appeal, pp. 31-33; J. S., p. 16) The argument rests upon an incorrect reading of the Commission's report. The Commission specifically said that it was not confining its attention to the competition afforded by Penn and Central between common points of origin and destination but on the contrary was considering competition in terms of "origin, destination or bridge service" (327 I. C. C. at p. 509. See also *id.* at pp. 512-14)

Appellants have made no concrete claim that the Commission failed to give adequate consideration to the effect of the merger upon "market competition" in any specific product or specific geographical area. As the Commission declared, the merger applicants participate "in the transportation of practically the entire gamut of commercial commodities, originating and terminating in virtually all sections of the country, and at overseas points as well." (327 I. C. C. at p. 510; 328 I. C. C. at p. 309) It can hardly be contended that the Commission was required to make formal findings as to the competitive consequences of merger for each product transported by the two carriers in each geo-

graphical area served by them, and appellants have never suggested that they or any other party to the Commission's hearings introduced evidence as to market competition in particular commodities which the Commission failed properly to appraise.

The Examiners also considered at length and rejected the argument that the merger was objectionable because interlocking directorates between Penn-Central, on the one hand, and large commercial corporations not engaged in transportation activities, on the other, might create possibilities for the practice of reciprocity. (Proposed Report, at pp. 93-100) The Commission adopted these findings and conclusions of the Examiners. (327 I. C. C. at pp. 481-82)

In its opinion of October 1966 denying the motions for a temporary injunction the District Court held that the initial report of the Commission "fully complied with the directions of the Supreme Court in such recent decisions as *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173, 186 (1959), and *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 (1965)." (259 F. Supp. at pp. 966-67) We submit that this holding was a plainly correct disposition of the contention that the findings of the Commission are deficient in their treatment of competition and related antitrust problems, and should be confirmed by this Court.

Other objections mentioned by Shapp and Scranton here or in their earlier pleadings are adequately answered by the Commission's own discussion and findings, as, for example, the contention that the Commission erred in not prescribing conditions to protect the employees of other carriers (328 I. C. C. at pp. 313-14); the contention that the Commission did not make adequate findings with respect to the impact of the proposed merger upon the national defense and the postal service (327 I. C. C. at p. 520); and the

contention that the Commission should have reopened the proceedings to receive certain new or additional evidence (327 I. C. C. at pp. 484-86).

CONCLUSION

For all the foregoing reasons, the judgment of the District Court dismissing the complaints of appellants Shapp and Scranton was clearly correct and should be summarily affirmed.

Respectfully submitted,

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No. 835

In The

Supreme Court of the United States

October Term, 1967

CITY OF SCRANTON and MILTON J. SHAPP,
Appellants

v.

UNITED STATES OF AMERICA et al.,
Appellees

On Appeals from the United States District Court for the Southern District of New York.

BRIEF, AMICUS CURIAE, OF THE COMMONWEALTH OF PENNSYLVANIA

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On Appeals from the United States District Court for the Southern District of New York.

BRIEF, AMICUS CURIAE, OF THE COMMONWEALTH OF PENNSYLVANIA

THE INTEREST OF THE COMMONWEALTH OF PENNSYLVANIA

The Commonwealth of Pennsylvania (Commonwealth) has a vital interest in protecting and promoting the establishment and maintenance of a viable, adequate and efficient transportation system in the public interest, and for the benefit of all the inhabitants of the Commonwealth.

The merger which is the subject of the instant appeals would appear to affect materially the character

addition, the Commission has reserved the right to impose indemnity payments retroactive to the date of consummation of the merger.

The Commonwealth is of the view that the public interest will be best served by prompt action denying the appeals from the District Court. The Commission has found that:

> "... the merger will benefit rather than harm the Commonwealth. It will assist in attracting new industries through the applicant's increased ability to meet the needs for specialized equipment, more adequate car supply, new land for industrial development and expanded transit and stop-off privileges. It will open NYC marketing areas to Pennsylvania industries and will make available improved service from Pennsylvania communities to NYC points in other States. The concentration of maintenance and construction operations in Pennsylvania should bring a net gain of employment to the Commonwealth . . ." (327 ICC, pages 492-493).

The Commonwealth is engaged in a program to promote high speed rail transportation railroad service as well as improvements in urban common carrier mass transportation by railroads and other carriers. This program is directly related to PRR since it transports more passengers, and over longer routes, than any other railroad in Pennsylvania. The improvement of the financial strength and stability of PRR as a result of its merger with NYC will make it better able to cooperate with the Commonwealth in achieving the goal of better passenger service.

Delay of the merger pending termination of the proceedings before the Commission involving protective conditions and inclusion of E-L, D & H and others in the Norfolk and Western system will unwarrantedly postpone the benefits to the Commonwealth of the PRR-NYC merger. There is always the possibility that further delay could cause the merger never to be consummated. In such event, the benefits of the merger would be permanently lost to the Commonwealth, a result which would not be in the public interest.

CONCLUSION

The Commonwealth respectfully submits that the proposed merger of PRR and NYC will be economically beneficial to the Commonwealth as shown by the findings of the Commission and the District Court. The Commission has imposed traffic conditions on the merging railroads which will afford reasonable protection to their competitors pending a final determination by the Commission whether additional protective provisions or revised indemnity provisions should be imposed on the merged railroad. The PRR and NYC have indicated to the Commission their willingness to abide by such post-merger protective conditions as may be imposed by the Commission, including retroactive indemnity payments. Under these circumstances, prompt and early consummation of the proposed merger is in the public interest and the decision of the District Court in the instant proceedings should be affirmed.

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No. 778

Supreme Court of the United States

October Term, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants

v.

UNITED STATES OF AMERICA, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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Supreme Court of the United States

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BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

The motions to affirm filed by the various appellees have brought the central controversy in this case into sharp focus. Thus, the principal appellees—the United States and the Commission itself—now appear to concede that if the *Inclusion* order is set aside, the Penn-Central merger cannot be consummated, since "an appropriate haven" will not have been found for the three protected railroads (U.S. Mo. Aff., p. 22). Hence, the only substantial issue which now separates the parties to this case is whether the merger can be consummated if the *Inclusion* order is affirmed. Appellees' motions to affirm confirm the soundness of our position that, even on that assumption, the merger cannot now be consummated.

Throughout these proceedings, the basic problem facing the Commission has been to find a way in which it could condition the merger of the two largest railroads in the East so as to permit consummation of the merger without threatening the ability of other Eastern railroads to provide vital transportation service. In its original report, the Commission found that the essential transportation services of EL, D&H and B&M must be preserved, and that their services could not be preserved if these railroads remained independent following consummation of the Penn-Central merger (327 I.C.C. at 529, 532). The Commission originally found that it could not absolutely guarantee that each of these railroads would be included in a major system, but it nonetheless would have permitted immediate consummation of the merger on the hope and expectation that EL, D&H and B&M could be taken care of later (328 I.C.C. at 312).[1] When the Commission's approach was attacked upon judicial review, this Court rejected the idea that the task of guaranteeing the essential services of EL, D&H and B&M could be deferred until after the consummation of the merger. Instead, it held that these services must be preserved through the inclusion of those roads in a major system before the merger was consummated (386 U.S. at 378, 390).

Upon remand, the Commission decided the *Inclusion* case on the stated assumption that its order would fulfill

[1]The New Haven Trustees appear to rely upon the fact that the Commission in September of 1966 "recognized" that the protected roads might not be included in a major system (New Haven Trustees' Mo. Aff., pp. 14-15). But this Court reversed that order precisely because no determination had been made as to the inclusion of these roads "in a major system . . . prior to consummation of the Penn-Central merger" (386 U.S. at 390).

this purpose (330 I.C.C. at 329, 350, 355). Yet, as we have shown both in our Jurisdictional Statement and in the briefs filed in the district court, the *Inclusion* order does not determine the ultimate fate of all three of these railroads, since at least one, and possibly two of them will not accept the terms of that order. In these circumstances, neither the Commission's basic finding nor this Court's mandate has been satisfied, for the ultimate fate of any railroad remaining outside of N&W obviously has not been determined and nothing whatever has been done to assure preservation of the essential services of such a railroad.

The most significant aspect of the appellees' motions to affirm is that each of them virtually admits these errors in the Commission's order. Appellees concede, as they must, the "possibility" that "of the three smaller roads offered inclusion in the N&W system . . . one, and perhaps two, may decline the offer" (U.S. Mo. Aff., p. 16). They also recognize that, if this should happen, "the mere *offer* of inclusion does not settle the 'fate' of the affected roads" (*id.*, at p. 22), for the Commission would still be forced to find a home for them from among the several possible alternatives to N&W inclusion which exist, one of which is inclusion in the Penn-Central system.

Thus the questions now before the Court all arise from this now-conceded fact that despite the holding of this Court that the ultimate fate of EL, D&H and B&M was to be determined prior to the merger, one or more of those railroads will, under the Commission's order, still

be looking for a home after the merger has been consummated.

1. The Commission Has Failed To Preserve The Essential Services Of The Protected Roads, Not Because It Lacked Power To Compel Inclusion, But Because It Imposed The Appendix G Conditions.

Although certain of the appellees attempt to cloud the issue by re-arguing the merits of the case decided by this Court last term, the mandate of this Court has not been observed. Indeed, this fact emerges with unmistakable clarity from the Government's own motion to affirm.

The Government does not even attempt to explain how the admitted necessity for a *future* determination of the appropriate fate of one or more of the protected railroads can be squared with the plain language of this Court's decision which required the determination of the ultimate fate of those roads *before* the merger is consummated. Nor does it explain how the essential services of such a railroad will be preserved while this determination is being made. Instead, the Government devotes itself principally to a discussion of the limitations upon the power of the Commission under Section 5 of Interstate Commerce Act (49 U.S.C. § 5), pointing out that under that section "the Commission can only determine whether, and upon what conditions, carrier-initiated proposals for merger or inclusion will be in the public interest" and that it "cannot order the beneficiaries of the order to accept the proffered home" (U.S. Mo. Aff., p. 23). The Government argues, in effect, that the Commission has done everything that

it had the power to do, and that the opinion of this Court should not be interpreted to require anything more.

Throughout all of this argument, the Government fails to recognize that the decision of this Court was designed to protect, not the private interests of the stockholders of EL, D&H and B&M, but the public interest in preserving the essential services of those railroads. Thus, the Government interprets this Court's decision as not requiring the Commission "to do more than offer the *potential victims* of the merger a safe haven on equitable terms" whether or not "the *beneficiaries* of the order . . . accept the proffered home" (*ibid.*). (Emphasis added.)

The error in the Government's approach is that it ignores the fact that the "potential victims" of the merger and the "beneficiaries" of the Commission's order are two separate groups with widely disparate interests. The "potential victims" of the Penn-Central merger under the Commission's own basic finding are the members of the public who must depend upon the essential transportation services of EL, D&H and B&M. The "beneficiaries" of the Commission's *Inclusion* order are not those "potential victims," but instead are the stockholders of the three railroads.

Seeking to make it appear that the interests of these two groups coincide, the Government supports the order of the Commission because "now, all three roads are content to allow consummation to proceed" (U.S. Mo. Aff., p. 23). In the ordinary case this approach might have merit, since normally a stockholder cannot

realize a profit on his investment unless his railroad provides service for which the public is willing to pay. However, the Commission's order in this case has destroyed this normal coincidence of interest between the public and the stockholders of EL, D&H and B&M. Under the Commission's order, with the unique revenue-sharing provisions of Appendix G, the stockholders of EL, D&H and B&M may realize handsome profits even if the services of those railroads deteriorate to the point where they are of no use at all to the public.

The Commission has *not* done all it could to preserve the essential services of D&H and B&M, as required by this Court's mandate. The totality of the Commission's efforts to preserve the essential services of these railroads amounts to nothing more than offering them a home in N&W, on the one hand, while removing the incentive for them to accept that home on the other.[2] In fact, by leaving open to D&H and B&M the possibility of inclusion in Penn-Central, the Commission has created an affirmative incentive for those railroads to reject inclusion in N&W, since they are now free to seek a higher price from Penn-Central while the stockholders of these railroads enjoy complete protection under Appendix G.

As a practical matter, the question of the extent of the Commission's power under Section 5 would not have

[2]The fact that EL's shareholders have nevertheless accepted the terms of the *Inclusion* order serves to emphasize the complete lack of correlation between the inflated terms offered to EL and EL's plummeting earnings. N&W contends that the terms offered all three railroads are excessive, but the disparity between EL's "normal" earnings of $9.5 million as found by the Commission and its reported current deficit of $10 million is especially extreme (See N&W's Brief in Opposition in No. 779).

become relevant here at all if the Commission had not imposed, *sua sponte*, the Appendix G conditions, and thereby separated the interests of the shipping public from those of shareholders of the protected roads. Without the financial protection of Appendix G, no railroad faced with destruction by Penn-Central could even have contemplated the course now being pursued by B&M, and perhaps D&H. The real question in this case, therefore, is not whether the Commission is powerless to prevent "a rash gamble" by the stockholders of any railroad (U.S. Mo. Aff., pp. 25-26), but whether it ought to have created a situation in which the stockholders take no gamble even if Penn-Central destroys their railroad's ability to provide essential service. It is the Commission's unsupportable exercise of power, not its lack of power, that is at issue here.

We submit that the Commission's action in permitting such a riskless "gamble" is clear error. If the Commission's decision in the *Inclusion* case that the protected railroads should be included in N&W is sound, then such inclusion obviously should occur as soon as possible. What then is the purpose of the protective conditions? When Appendix G was originally injected into this case by the Commission in 1966, before the hearings in the *Inclusion* case had even begun, its purpose was to afford protection during an interim between consummation of the merger and determination of inclusion. But as this Court recognized in its previous opinion, such protection will be unnecessary if the *Inclusion* case has actually determined the ultimate fate of the protected

realize a profit on his investment unless his railroad provides service for which the public is willing to pay. However, the Commission's order in this case has destroyed this normal coincidence of interest between the public and the stockholders of EL, D&H and B&M. Under the Commission's order, with the unique revenue-sharing provisions of Appendix G, the stockholders of EL, D&H and B&M may realize handsome profits even if the services of those railroads deteriorate to the point where they are of no use at all to the public.

The Commission has *not* done all it could to preserve the essential services of D&H and B&M, as required by this Court's mandate. The totality of the Commission's efforts to preserve the essential services of these railroads amounts to nothing more than offering them a home in N&W, on the one hand, while removing the incentive for them to accept that home on the other.[2] In fact, by leaving open to D&H and B&M the possibility of inclusion in Penn-Central, the Commission has created an affirmative incentive for those railroads to reject inclusion in N&W, since they are now free to seek a higher price from Penn-Central while the stockholders of these railroads enjoy complete protection under Appendix G.

As a practical matter, the question of the extent of the Commission's power under Section 5 would not have

[2]The fact that EL's shareholders have nevertheless accepted the terms of the *Inclusion* order serves to emphasize the complete lack of correlation between the inflated terms offered to EL and EL's plummeting earnings. N&W contends that the terms offered all three railroads are excessive, but the disparity between EL's "normal" earnings of $9.5 million as found by the Commission and its reported current deficit of $10 million is especially extreme (See N&W's Brief in Opposition in No. 779).

become relevant here at all if the Commission had not imposed, *sua sponte*, the Appendix G conditions, and thereby separated the interests of the shipping public from those of shareholders of the protected roads. Without the financial protection of Appendix G, no railroad faced with destruction by Penn-Central could even have contemplated the course now being pursued by B&M, and perhaps D&H. The real question in this case, therefore, is not whether the Commission is powerless to prevent "a rash gamble" by the stockholders of any railroad (U.S. Mo. Aff., pp. 25-26), but whether it ought to have created a situation in which the stockholders take no gamble even if Penn-Central destroys their railroad's ability to provide essential service. It is the Commission's unsupportable exercise of power, not its lack of power, that is at issue here.

We submit that the Commission's action in permitting such a riskless "gamble" is clear error. If the Commission's decision in the *Inclusion* case that the protected railroads should be included in N&W is sound, then such inclusion obviously should occur as soon as possible. What then is the purpose of the protective conditions? When Appendix G was originally injected into this case by the Commission in 1966, before the hearings in the *Inclusion* case had even begun, its purpose was to afford protection during an interim between consummation of the merger and determination of inclusion. But as this Court recognized in its previous opinion, such protection will be unnecessary if the *Inclusion* case has actually determined the ultimate fate of the protected

roads, since there would be no such interim (386 U.S. at 390):

> "In view of the patent invalidity of the order permitting immediate consummation of the merger and in light of the present status of the litigation before the Commission, we can only conclude that it is necessary that the decision as to the future of the protected railroads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger. . . . Furthermore, there would be no occasion for the conditions of Appendix G being imposed and hearing and decision on this highly controversial matter would not be necessary insofar as the three protected railroads are concerned."

When the Commission reimposed the Appendix G conditions after it had decided the *Inclusion* case, it failed to recognize that the purpose it had previously relied upon to impose those conditions had ceased to exist. It also ignored the impact which its order would certainly have upon both the other railroads in the East and the public interest in balanced rail competition in that area. As pointed out in our Jurisdictional Statement (pp. 19-26) and in the briefs filed in the district court, no one can deny, and the United States has explicitly recognized, that if one or more of the protected railroads is made the beneficiary of Appendix G conditions on an indefinite or permanent basis, that railroad inherently becomes an ally of Penn-Central, and such an alliance is just as certain to cause harm to every other railroad in the East and to the public interest in balanced rail com-

petition.[3] Although some of the appellees seek to avoid this fact, none of them denies that it is established by the Commission's own finding, adopted from the report of its Examiners.

The Commission's Examiners expressly found that the Penn-Central merger would "undoubtedly result in a shifting of traffic patterns," but that the "net effect will not be detrimental" to the other Eastern railroads because they would enter into "new traffic relationships" (Recommended Report in F.D. 21989-21990, p. 305). Although the Commission adopted this finding as its own (327 I.C.C. at 481), it has now created a situation through the indemnity provisions of Appendix G in which at least one, and perhaps two, of the protected lines will be led, not to cooperate with other Eastern railroads to minimize the effect of Penn-Central, but to cooperate with Penn-Central itself. This can only increase the threat already inherent in that system to the railroads that must compete with it.

The failure of the Commission's order of June 9, 1967, to satisfy the mandate of this Court cannot be excused. The Commission should be compelled to deter-

[3] B&M attempts in its motion to affirm (p. 9) to convey the impression that N&W has stated that it would not be harmed if D&H and B&M were included in Penn-Central while EL were included in N&W. This is a misuse of the statement of counsel, who quite obviously was talking only of the N&W, and referring to the fact that as a predominantly coal-carrying road not operating east of Buffalo, N&W would prefer to suffer the harm from having D&H and B&M included in Penn-Central than to be required to acquire those two roads with which N&W does not even connect. Counsel plainly did not mean to indicate that EL would not be affected by the inclusion of D&H and B&M, in view of the economic "interdependence" of EL, D&H and B&M (330 I.C.C. at 798, 832). If N&W is to be compelled to include EL, it would be seriously harmed, as the owner of EL, by inclusion of D&H and B&M in Penn-Central.

mine the ultimate fate of D&H and B&M before consummation of the Penn-Central merger, as this Court held that it should, and the provisions of the Commission's order which tend only to frustrate such a determination should be set aside.

2. Appellees' Other Contentions Do Not Justify Immediate Consummation Of The Penn-Central Merger.

Penn and Central devote considerable space in their motion to affirm to an effort to demonstrate that these appellants are not injured by the Appendix G conditions, that the Penn-Central merger will provide substantial benefits to the public notwithstanding those conditions, and that, beyond these benefits, immediate consummation of the merger is justified as a means of saving the New Haven. Each of these matters is covered at length in our Jurisdictional Statement, as well as in the briefs filed in the district court. It is appropriate, however, simply to restate succinctly our position on each one of these matters:

(1) The Commission erroneously relied upon the assumption that all three of the protected railroads would accept the Inclusion order when it held that Appendix G could not harm the unprotected railroads since it would be in effect only a relatively short period of time during which the protected roads would expect to become affiliates of N&W. Penn and Central (P-C Mo. Aff., pp. 9-12), concede that the Commission relied upon these grounds but argue that there are also "substantial grounds

entirely independent of any question of the expectation of the protected lines as to their future" (P-C Mo. Aff., p. 10). The question presented to the Court is whether the Commission's reliance upon grounds now shown to be contrary to fact can be disregarded and grounds not relied on by the Commission can be substituted. This would be a plain violation of the *Chenery* rule (J.S., pp. 15-19).

(2) There is neither evidence in the record nor findings in the Commission's report to support the district court's belief that Penn-Central could achieve substantial savings despite Appendix G (J.S. at B15) or the argument, advanced by Penn and Central after the record in the case had been closed, that merger projects could or would be started before a definite end of the protective period was in sight.

Again, only Penn and Central even discuss this point (P-C Mo. Aff., pp. 12-16). They implicitly concede that there is no specific evidence to support a finding of savings in the record, and the only Commission finding on the subject to which they point is a statement by the Commission that "the public interest requires that the applicants be permitted to commence achieving the substantial savings which the merger will make possible at the earliest possible date" (330 I.C.C. at p. 361, quoted at P-C Mo. Aff., p. 15), which is not a finding that benefits can ever be achieved under Appendix G. The question for the Court to decide here is whether the record must contain evidence and findings that merger benefits can be realized under the conditions attached to that merger.

(3) It would be contrary to the public interest to permit Penn and Central to buy the right to consum-

mate their merger by offering to loan money to the New Haven, in view of the harm which would be occasioned to other railroads. The eleventh-hour arrival of the Commission's November 21 order in the *New Haven* proceedings comes as no surprise. Nor does it change the fact that the principal appellees now attempt to justify consummation of the Penn-Central merger on the ground that those two railroads are willing to lend the New Haven some badly needed money.

The Commission's latest order does not achieve the inclusion of the New Haven into Penn-Central. It merely sets terms, subject to approval by the reorganization court, which if approved will not be carried out for at least another year.

If the New Haven needs funds by January 1, 1968, to maintain its services, and if the public interest demands that these services be maintained, there is every reason to believe that public funds can and will be found. The States have been contributing to the support of the New Haven for some years, and if wage increases have aggravated the New Haven's need for funds, there is no reason to believe that the States will not make the additional contribution to meet the additional need.[4] If the States concerned do not see fit to continue their subsidization, they can loan funds to aid the New Haven through this interim period through participation in trustees' certificates.

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[4]On November 7, 1967, the voters of New York approved a $2.5 billion bond issue to meet the transportation needs of the State, including the need for funds to support rail commuter services (*N. Y. Times*, November 9, 1967, p. 1, col. 6).

However, even if Penn and Central should enter into a loan arrangement with the New Haven, this in no way requires consummation of their merger by January 1. Their assertion that this money can only be lent if "prompt consummation of the Penn-Central merger" occurs (P-C Mo. Aff., p. 19) is a bald effort to buy their merger at the expense of the other railroads in the East. Penn and Central can loan money to New Haven without any guarantee that their merger will be consummated by January 1, and without prejudice to their sharing in New Haven losses at such time as consummation of their merger is authorized consistent with the mandate of this Court.

Conclusion

For the foregoing reasons, the order of the Commission in the Penn-Central merger case should be set aside.

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Nos. 778, 779, 830, 831, 832, 833, 834, 835, and 836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
NORFOLK AND WESTERN RAILWAY COMPANY,
OSCAR GRUSS & SON,
NEW YORK, NEW HAVEN AND HARTFORD R.R. CO. FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
ERIE-LACKAWANNA RAILROAD COMPANY, *et al.*,
BOSTON AND MAINE CORPORATION,
READING COMPANY,
CITY OF SCRANTON, *et al.*,
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF THE DELAWARE AND HUDSON RAILROAD CORPORATION TO MOTIONS TO AFFIRM OF OTHER PARTIES

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The Jurisdictional Statement of EL and D&H* in No. 832, together with the briefs of D&H in the District Court of August 8 and September 12, 1967 in the *Merger* case, demonstrates that the Commission erred in not reserving jurisdiction to require a capital loss indemnification of EL and D&H by Penn-Central should judicial review and remand of the N&W *Inclusion* case result in a downward

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*All abbreviations are those used in D&H's Motion to Affirm dated November 27, 1967.

revision of the terms for inclusion because of the traffic consequences of a Penn-Central merger. As there explained, this condition is grounded on the public interest in maintaining rail competition to the extent feasible after consummation of the Penn-Central merger.

Penn and Central, in their Motion to Affirm in Nos. 778 and 832 (pp. 19-22) oppose the appeal of D&H and EL in No. 832 in this regard solely on the argument that the Commission lacks authority under Section 5(2) of the Interstate Commerce Act, 49 U. S. C. §5(2), to impose a capital loss indemnity condition on Penn-Central. Their contention is (*id.* at 22) that securityholders of D&H and EL run the risk of impairment of the value of those roads to N&W by an authorization of Penn and Central to merge and that nothing in the Act *requires* compensation for such impairment.

There is no merit to this contention. Section 5(2) of the Interstate Commerce Act provides that Commission authorization of a merger transaction shall be subject to such terms and conditions as the Commission shall find to be "just and reasonable." Certainly there is nothing in the Act which *prohibits* compensation for such impairment of value; and if, under the unique circumstances of these interrelated *Merger* and *Inclusion* cases, such compensation is "just and reasonable" in order to achieve the goal of competitive rail systems in the East, then the Commission clearly does have authority to require such compensation.*

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* In its discussion of this matter, the State of New York in its Motion to Affirm lists (p. 17) other questions which it says must be decided in the affirmative by this Court before it can determine that the Commission erred in failing to retain jurisdiction to impose a

Were it not for the single, but major, public interest consideration of providing system rail competition in the area east of Buffalo, D&H, for example, could be, and no doubt would be, included in the Penn-Central system itself. As Penn and Central themselves point out in their Motion to Affirm in Nos. 830 and 831 (p. 19), the Commission has already determined in the case of NH not to reduce the price Penn-Central should pay for NH because of the adverse effects of a Penn-Central merger on NH. Penn and Central have further conceded that if D&H and EL were to be included in Penn-Central, the adverse effects of the Penn-Central merger on D&H and EL should not affect the price for such inclusion (Transcript before the Commission in the *Merger* case, pp. 21205-06).

It is similarly fair and appropriate, if D&H must join N&W rather than Penn-Central in order to satisfy the public interest in continued rail competition, that D&H should not be required to suffer a cut in the price N&W would otherwise pay because of the adverse effects on D&H of a Penn-Central merger unless D&H receives compensation therefor from Penn-Central. The same is true as to EL on whose inclusion in N&W D&H inclusion has been made dependent. Terms requiring such a reduction in the price N&W would pay without compensation from Penn-Central would not, under the circumstances of these cases, be "equitable" to D&H as the statute requires.

This is the position taken by Commissioner Webb in his Recommended Report, served December 22, 1966, in the *Inclusion* case where he said (p. 28) that the inclusion of D&H, EL and B&M

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capital loss indemnity condition on Penn-Central. Such other questions are initially for the Commission on any remand in the *Inclusion* case based on N&W's appeal in No. 779, not this Court.

"in the system chosen by the Commission in the furtherance of national transportation objectives should not be on terms which reflect any diminution of capital value attributable to the traffic diversion impact of the other system. In other words, the petitioners should not be penalized for anticipating the Commission's desire to preserve rail competition in the territory they serve. Whether or not the Commission should require capital loss indemnification to facilitate inclusion of petitioners in N&W is a matter which, presumably, will be determined in the light of further hearings in the Penn-Central case if such a determination seems necessary or desirable."

The full Commission's decisions in the *Merger* and *Inclusion* cases in no way cast doubt on the soundness of this position but, rather, go off on the Commission's finding that there would be no net adverse effect on the traffic of the petitioners after inclusion in the N&W system on account of the Penn-Central merger.

In connection with this matter, NH suggests, in its Motion to Affirm (p. 20), that the Commission's general reservation of jurisdiction in the Penn-Central merger case is sufficient to enable the Commission to impose a capital loss indemnity on Penn-Central *after* the Penn-Central merger is consummated. Clearly no one can be expected to rely on such a general reservation when (a) the Commission has expressly denied the petition of EL for reconsideration requesting the Commission to reserve jurisdiction to impose a capital loss indemnity condition on Penn-Central (Supplemental Order in the *Merger* case, dated Sept. 8, 1967) and (b) the opinion of the District Court is to the effect that such a condition may be imposed only if this Court so directs (J. S. No. 778, B-16-17,

B-69). Penn and Central obviously do not regard the general reservation of jurisdiction (which they have accepted) as sufficient to permit imposition of such a condition after the merger, or they would not now be contending that the Commission lacks statutory authority to impose the condition.

To conclude: D&H has pointed out in its papers in the *Inclusion* case why the Commission's finding that N&W is not entitled to a reduction in the price for D&H or EL because of the effects of a Penn-Central merger is a sound finding supported by the evidence of record. However, if the Commission's finding in this regard is upset by this Court and the matter remanded to the Commission for further proceedings in the *Inclusion* case, the Commission should be directed to retain jurisdiction in the *Merger* case to impose on Penn-Central a capital loss indemnity provision in the event it is ultimately determined that the terms for inclusion of D&H or EL in N&W must be revised downwards because of the adverse effects of Penn-Central. In the event of any such remand, such a condition would serve the public interest in establishing competitive system rail service east of Buffalo and thus accommodate the Penn-Central merger to the policies of the antitrust laws.

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No. 779

Supreme Court of the United States

October Term, 1967

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant

v.

UNITED STATES OF AMERICA, et al.,
Appellees

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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Appellees refuse to face reality. They acknowledge, as they must, that the Commission's order in this *Inclusion* case was entered on the express finding that N&W would acquire as subsidiary corporations a package of three profitable railroads. But appellees do not, and cannot, dispute our showing that the three railroads are operating at a deficit today, even before the impact of Penn-Central, and that, in any event, the package will be broken by one or two of the railroads.

Instead of facing the normal consequences of these facts, requiring that the Commission's order be set aside as arbitrary and unlawful, appellees ask this Court to brush aside these problems on grounds of administrative expertise and discretion. But Congress enacted the

Administrative Procedure Act to provide judicial protection against arbitrary and unsupported agency action. The need for performing this statutory duty is especially great in this case in which the public interest in the preservation of three railroads as competitors of Penn-Central is at stake.

1. The Commission Has Not Found That Any Public Interest Would Be Served By Directing N&W To Acquire The Stock Of Deficit Railroads.

EL is now operating at a *deficit* of approximately $10 million a year. In response to our argument that the Commission has not found that acquisition of EL as a deficit railroad would be in the public interest, the Government states: "The argument begs the essential question of whether the three roads would experience future deficits" (U.S. Mo. Aff., p. 18, n. 12a). This response not only begs the question but reflects a misconception of what the Commission actually did in finding EL's "normal" earnings.

EL's Motion to Affirm accurately summarizes the development of the Commission's finding that EL's normal earnings as an independent carrier are $9.5 million. EL's reported earnings rose from a deficit of $8.3 million in 1964,[1] to an average net income of $5.0 million for

[1]In 1964, the Commission found that "Erie-Lackawanna's financial condition is such as to render it impossible to frame terms for its inclusion which would be, as required by statute, fair, equitable, or reasonable to the Norfolk & Western and its stockholders" (324 I.C.C. at 22).

1965-1966 (EL Mo. Aff., p. 5).[2] As EL states (*id.* at 5, n. †):

> "The major adjustment made by the Commission in estimating EL's future contribution to the N&W system was to add to EL's average reported results during 1965-66 $4.5 million ($6.8 million less $2.3 million) representing additional commuter relief obtained from the State of New Jersey not reflected in 1965-66 results. 330 I.C.C. at 813-14."[3]

Thus, the Commission's process was not to make a long-range forecast that someday EL would achieve earnings of $9.5 million. To the contrary, the finding was that, with the commuter subsidy, that level of earnings had been achieved and constituted EL's "normal" level of earnings. And that finding was based, as EL states, on the premise that EL earnings had achieved a sensational "turnaround" since 1964 (EL Mo. Aff., p. 4).

Some turnaround. EL earnings have made a complete circle. Starting from a deficit of $8.3 million in 1964, EL earnings rose to an average of $5.0 million in 1965-1966 and have now turned back to a deficit in 1967 even greater than that experienced in 1964.

The Commission's finding of $9.5 million EL "normal" earnings cannot be passed off as permissible administrative forecasting when, at the time the case was

[2]To conform to EL's method, these earnings figures are stated as reported and before deduction of full contingent interest charges. In terms of earnings available for stockholders after full contingent interest charges, the reported figures must be reduced by $3.3 million (330 I.C.C. at 812, 816).

[3]The full amount of New Jersey commuter subsidy had been realized by EL by the end of 1966 and is therefore fully reflected in 1967 results.

before the Commission, EL had already reported that it had reverted to a deficit operation. It is arbitrary within the meaning of Section 10(e) of the Administrative Procedure Act to pretend that EL has achieved a "normal" net income exceeding $9 million when EL is in fact reporting a deficit of $10 million. And it is doubly arbitrary for the Commission to look at 1967 earnings reports to bolster its approval of the Penn-Central merger (330 I.C.C. at 361)[4] but refuse to acknowledge EL's deficit in the same period.[5]

Nor can this be brushed aside on the Government's theory that this being a matter of "valuation," no court should intrude, since such matters are the special prerogative of agency expertise (U.S. Mo. Aff., pp. 17-18). There is nothing complex or inscrutable about the principal issue before this Court. The Commission found that EL is a carrier with "normal" earnings exceeding $9 million in prescribing the price to be paid by N&W, and this finding is completely arbitrary when that carrier is again experiencing normal deficits.

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[4]Penn and Central continue to rely upon the 1967 decline in their earnings in this Court, citing their reports for the first nine months of 1967 (P-C Mo. Aff. in No. 835, p. 14).

[5]B&M confuses the issue by asserting that it was in light of "traffic gains, control savings and other specific adjustments" that the Commission found that "none of the petitioners will be deficit railroads" (B&M Mo. Aff., p. 8).

In the case of EL, the only significant savings, gains and upward adjustments not already realized by the end of 1966 amounted to $3.4 million (330 I.C.C. at 813) as compared with EL's reported deficit of $7.7 million for the first nine months of 1967.

In the case of B&M, the only savings, gains or adjustments not already realized by 1966 amounted to $1 million (330 I.C.C. at 821, 857) as compared with B&M's reported deficit of $1.5 million for 1966 and $2.9 million for the first nine months of 1967. And the Commission found on reconsideration that it "may have overstated the traffic gains allocable to B&M" (331 I.C.C. at 40).

The Administrative Procedure Act does not exempt such arbitrary agency action simply because value is at issue.[6]

In the district court (J.S. B51), and again in this Court (U.S. Mo. Aff., p. 29; EL Mo. Aff., pp. 10-12), great reliance is placed upon the alleged value to N&W of having a corporate subsidiary reporting tax losses. But quite apart from questions of fairness to N&W, what is the public interest in having deficit carriers as corporate subsidiaries of N&W? How can N&W's use of EL losses as tax deductions from its own income tax help EL to provide transportation service when confronted with Penn-Central competition? Under the tax benefit theory, the greater EL's losses and the more these losses are aggravated by the impact of Penn-Central, the greater the tax benefits to N&W.[7] But the greater EL's losses, the sooner the day will come that the shipping public will be deprived of its essential transportation services.

The whole point of this Inclusion proceeding was supposed to be the public interest in preserving the services of EL, D&H and B&M as railroads able to compete with Penn-Central. These railroads are being forced upon N&W in the name of the public interest, not to reward EL's present stockholders. But the district court,

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[6]The cases cited by the Government (U.S. Mo. Aff., pp. 17-18), all decided prior to the enactment of the Administrative Procedure Act in 1946, do not remotely justify judicial affirmance of the arbitrary and unsupported action of the Commission in this case.

[7]D&H conjectures that N&W may have an interest in keeping EL out of bankruptcy as a continuing tax loss (D&H Mo. Aff., pp. 7-8). But the Commission has never found that continuing EL as a tax loss device meets the public need for a viable competitor of Penn-Central. The Commission has erroneously refused even to face the realities of the problem of EL as a deficit carrier.

and now appellees, simply refuse to face up to the Commission's basic public interest finding that inclusion of these roads "in N&W by way of control" would enable the roads "to continue providing adequate transportation service" because, and only because, "the *normal earnings* of each petitioner after inclusion will be sufficient to meet their fixed charges" (330 I.C.C. at 795). (Emphasis added.)

This is not a game for EL stockholders to win because EL was lucky enough to present its evidence at a time of a temporary upswing in its earnings. The public interest in the future service of these railroads depends upon the integrity of the Commission's finding that EL has substantial "normal" earnings. And it was perfectly apparent to anyone willing to look that, by early 1967, EL had reverted to normal deficits. This Court recognized last Term that, "if not handled properly," the Commission's action could operate "to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation" (386 U.S. at 392). This is just what is threatened by the arbitrary failure of the Commission to recognize that EL individually, and the three protected carriers collectively, are deficit carriers, and by the refusal of the district court even to acknowledge the existence of this issue.

2. There Are No Findings To Support Inclusion Of EL Alone, Or EL And D&H Without B&M.

Appellees do not, and cannot, point to any finding of the Commission which would justify the inclusion in the N&W system of less than the package of three inter-

dependent railroads. The Government contends that the Commission "implicitly found" that inclusion of only EL, or EL and D&H, would be in the public interest (U.S. Mo. Aff., p. 28). The Government argues that, because the Commission's *order* would require N&W to include EL alone, or EL and D&H, the Commission must have "contemplated"—and implicitly found—that this was in the public interest and equitable to N&W (*id.* at 27). But it is no answer to a claim that an administrative order is unsupported to show what the order requires. The order requiring N&W to include one or two railroads is unsupported because all of the Commission findings are expressly premised on "conditions of four-way control" of all three railroads found to be economically "interdependent" (330 I.C.C. at 793, 834).

The Government also attempts to offset the plain fact that the order will not achieve inclusion of the three railroads in the N&W system by speculating as to what "B&M's own self interest requires" "if B&M remains independent" (U.S. Mo. Aff., p. 28, n. 21; see also EL Mo. Aff., p. 15). But the alternative of B&M independence will be foreclosed by Penn-Central, as the Commission has found (327 I.C.C. at 529, 532). And no appellee now expects B&M to be included in N&W under the *Inclusion* order. Thus the effect of affirming the judgment below would be to make B&M a party to a revenue pool with Penn-Central under the Appendix G indemnity conditions while B&M seeks affiliation with Penn-Central. Under the Commission findings, the Government cannot logically or realistically avoid the consequences of the Commission's action by speculating about what might occur "if B&M remains independent."

Nor can the Government properly avoid the proble presented by D&H's ambivalent stance. Any noti that D&H and B&M can be differentiated is dispelled the following statement of D&H to this Court (D& Mo. Aff., p. 17, n.***):

> "D&H agrees that when B&M is in fact i cluded in any of the major systems under discussio the D&H and B&M properties should be in t same system."

The suggestion of D&H counsel that N&W be requir to buy D&H now in the hopes of selling D&H to Pen Central at such time as B&M is included in that syste (D&H Mo. Aff., p. 17) shows the extremes to whi counsel are driven in attempting to cope with the pro lems inherent in the Commission's failure to determi the ultimate fate of these railroads now, as directed this Court.

Appellees urge that the judgment below be affirme but they avoid like the plague the basis for decisi adopted by the court below. The district court he that the Commission had *not* made findings necessa to support inclusion of EL alone, but stated it wou "not reverse on that ground" solely because of its ov finding that "rejection by D&H's stockholders is unlikely" (J.S. B61). The Government asserts elsewhe that Penn-Central should not be delayed because "pa ticular interests have indulged in a rash gamble" (U Mo. Aff., p. 25). But the shoe is on the other foot. T district court is requiring N&W and the public to gamb on the accuracy of that court's guess that two-thirds D&H's stockholders will affirmatively vote in favor

the Commission's order when the principal stockholde of that railroad, who is also its President, will not sa how he will vote. If the district court has guessed wrong the public interest and N&W both suffer from the en forcement of a Commission order admittedly lacking i essential support.

The Government seeks to excuse the Commission' failure to take account of the conceded possibility tha D&H and B&M stockholders will reject the Commission' order by asserting that "The Commission cannot provid a solution to every permutation and combination o events that ensue from its orders. It can only defin equitable terms that offer an opportunity to be include in a more rationally structured railroad system." (U.S Mo. Aff., pp. 29-30.) This misstates the issue. There ar not that many alternatives to be considered, and th Commission could neither define equitable terms, no protect the public interest, without assessing the al ternatives.

The Commission brought these problems upon itself It could have avoided these alternatives by deciding *th* ultimate fate of each railroad and, having foreclosed othe alternatives, the economic realities of Penn-Centra would have required each carrier to join the railroa system to which it was assigned on the terms prescribe by the Commission. Although this was the course con templated by the opinion of this Court last Term, th Commission chose to proceed step by step, leavin alternatives open and providing an indemnity to enabl the stockholders of the protected carriers to shop aroun after consummation of the Penn-Central merger. Eve

on this step-by-step approach, the Commission was not as powerless as the Government pretends. The Commission could have removed this speculation by requiring the vote of D&H and B&M stockholders, and still can in a matter of weeks.[8]

3. The District Court's Disposition Of The Issues Violates The Standards Governing Judicial Review Of Administrative Orders.

> "*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962).

In order to uphold the Commission's order, the district court undertook, in violation of the *Chenery* rule, to make findings which the Commission did not make, some of which conflict with findings the Commission did make. In this Court, appellees are again obliged to resort to contentions which were not adopted by the Commission and which are designed to impeach findings the Commission did make.

For example, the Commission found (330 I.C.C. at 840):

> "If B&M were not controlled by N&W but remained an independent carrier the net reduction

[8]EL's vote was taken on August 28, 1967, EL obviously desiring to sell to N&W at the price fixed without regard to the uniquely precipitous decline in EL's earnings. D&H, on the other hand, naturally prefers to defer a vote until the *Inclusion* order is affirmed so that it can then decide whether to accept inclusion in N&W or use the prescribed terms as a floor for further negotiations with Penn-Central.

> in EL and D&H annual gross freight revenues would no doubt be greater. The record does not permit any reliable estimate of the increased loss."

Apart from the fact that the Commission had already found that B&M cannot remain an independent carrier after consummation of Penn-Central (327 I.C.C. at 529, 532), the Commission has (1) failed to find what the loss would be for an EL-D&H system, and (2) has found that the "record does not permit any reliable estimate of the increased loss." Yet the Government presents calculations and assertions asking this Court to find that the "fact is, however, that the differences are very slight" (U.S. Mo. Aff., pp. 28-29; see also EL Mo. Aff., pp. 13-15; D&H Mo. Aff., p. 13).[9] But this is the very fact that the Commission held could not be found.[10]

Moreover, in asserting that the absence of D&H and B&M will have little effect on EL (EL Mo. Aff., pp. 13-15), EL is asking this Court to impeach the Commission's conclusions as to the economic "interdepend-

---

[9]The Government errs in asserting that this subject affects only "the price of the roads to be included" (U.S. Mo. Aff., p. 28). The amount of the increase in the loss affects the earnings of each road and that in turn affects both price and ability to compete in the face of Penn-Central (as discussed at p. 6, *supra*).

[10]The Government also suggests that N&W was at fault for not furnishing evidence on this subject (U.S. Mo. Aff., p. 29). But N&W agreed with the evidence, adopted by the Commission, showing the "interdependence" of the three railroads and showing that, if included at all, they should be included as a package. Accordingly, there was no occasion for N&W to present evidence contradicting that showing.

Moreover, the Government is incorrect in saying that N&W presented no independent studies of the effect of Penn-Central on these three roads (U.S. Mo. Aff., p. 29). The Commission found that it was N&W (not the three petitioning railroads) that "produced a clear and comprehensive traffic diversion study" (330 I.C.C. at 837). That study, like petitioners' study of traffic gains relied upon by the Commission, was based on the premise of "conditions of four-way control" (330 I.C.C. at 806, 836).

ence" of EL, D&H and B&M (330 I.C.C. at 793, 832). The short answer to all of these contentions in this Court is that the Commission did not so find, and that its order is not supported by the findings which it did make.

Accordingly, the *Chenery* rule requires that the Commission's order be set aside.

Conclusion

For the foregoing reasons, the Commission's order in this *Inclusion* case should be set aside.

Respectfully submitted,

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November 30, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 830

OSCAR GRUSS & SON,

Appellant,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF OSCAR GRUSS & SON, APPELLANT, OPPOSING MOTIONS TO AFFIRM

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BRIEF OF OSCAR GRUSS & SON, APPELLANT, OPPOSING MOTIONS TO AFFIRM

The United States and the Interstate Commerce Commission (the "Commission"); The Pennsylvania Railroad Company ("Penn") and The New York Central Railroad Company ("Central"); and Richard Joyce Smith and William J. Kirk (the "New Haven Trustees"), Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor ("the New Haven"), the defendants and intervening defendants in the action brought by Oscar Gruss & Son ("Gruss"), appellant, have filed motions to affirm in this matter.[1]

---

[1] The motion of the United States and the Commission will be referred to herein as the "Government motion", that of Penn and Central as the "Penn-Central motion", and that of the New Haven Trustees as the "New Haven Trustees' motion". The Delaware and Hudson Railroad Corporation has filed a motion to affirm, captioned in this matter, among others, which takes no position with respect to this appeal.

Motions to affirm have also been filed by the State of Connecticut, the Commonwealth of Massachusetts, and the State of Rhode Island and Providence Plantations, and by the State of New York, which were not parties to the action brought by Gruss below.

On November 21, 1967, after the filing of the Jurisdictional Statement herein, the Commission served a Second Supplemental Report dated November 16, 1967 (the "November 1967 Report") with two orders dated November 16, 1967, based thereon, and filed the report and orders with this Court. The November 1967 Report purports to dispose of certain of the issues that were pending when the Jurisdictional Statement was prepared.

POINT I

Consummation of the merger of Penn and Central, without concurrent inclusion of the New Haven, would violate the Interstate Commerce Act.

The motions to affirm deal with the questions presented in the Gruss Jurisdictional Statement principally by evading, rather than answering, the arguments of Gruss, and by disregarding the facts on which the arguments are based.

A. The case of Gruss for reversal of the order below is based upon the following propositions:

1. Section 5 (2) (b) of the Interstate Commerce Act permits the Commission to approve and authorize a merger of two or more carriers, if and only if the Commission finds that, subject to such terms and conditions and modifications as it shall find to be just and reasonable, the proposed transactions will be consistent with the public interest.

2. Here the Commission has found that the merger of Penn and Central, without complete inclusion of the New Haven, would not be consistent with the public interest. 327 I.C.C. 475, 524.

3. The terms and conditions imposed on Penn and Central by the Commission provide no reasonable assurance that the New Haven will ever be included in the merged Penn-Central, and will certainly delay and probably prevent such inclusion.

The Penn-Central motion suggests (at pp. 11-14) that the Commission did not mean what it said when it found that "this merger, without complete inclusion of NH, would not be consistent with the public interest". (327 I.C.C. 475, 524) It is quite true, in the context of the prior discussion to which the Commission refers (327 I.C.C. at 522-4), that the Commission was concerned with inclusion of the New Haven's passenger operations as well as its freight operations. That does not alter the scope or meaning of the finding, or of the related finding that "inclusion of New Haven's freight and passenger operations in this transaction will be consistent with the public interest" (327 I.C.C. at 526-7).

The plight of the New Haven may not be the only reason for approving the merger of Penn and Central, but that is not the point. The point is that the Commission found that complete inclusion of the New Haven is essential, and that without such inclusion the merger of Penn and Central would not satisfy a basic requirement of the Interstate Commerce Act.

B. The New Haven Trustees' motion suggests that Gruss is seeking to delay the merger of Penn and Central

for "an extended period", until completion of proceedings for determination of inclusion terms under the Bankruptcy Act and the Interstate Commerce Act.

What Gruss is actually seeking is an interim procedure for actual inclusion of the New Haven operations in the merged Penn Central while the terms of sale are being finally determined. Terms of inclusion on an interim basis were suggested by Gruss to the Commission, after Penn and Central and the New Haven Trustees had failed to do so pursuant to the Commission order dated August 1, 1967. The delays to date have been caused by the intransigence of Penn and Central, the subservience of the New Haven Trustees to their wishes,[2] and the Commission's acquiescence in their defiance of the August 1 order.

C. The continued operation of the New Haven railroad by the New Haven Trustees, with or without a loan, is not inclusion of the New Haven in the Penn-Central merger, *de facto* or *de jure*.[3]

The basic concept of inclusion of the New Haven in the Penn-Central merger involves the conduct of the New Haven railroad operations by the merged company.

Inclusion of the New Haven in the merged Penn-Central can be accomplished in several ways including, but not

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[2] The New Haven Trustees are committed not to make any statement or file any document in the merger proceedings, or any judicial review thereof, inconsistent with the provisions and intent of their agreement with Penn and Central. See Gruss Application for Stay, Appendix B, p. 21.

[3] The use of the terms *"de facto* inclusion" and *"de jure* inclusion" appear in the New Haven Trustees' motion, at pp. 21 *et seq.* The Commission, the Government motion, and the Penn-Central motion all recognize that a loan is not inclusion, *de facto* or *de jure*.

limited to, a sale of all the New Haven properties to the merged Penn-Central:

> It could be accomplished, as proposed by Penn and Central in their brief filed with the Commission on June 1, 1964, by an operating agreement under which Penn-Central would operate the facilities of the New Haven without acquiring ownership thereof.[4] According to Penn and Central at that time, the coordination of operations through such an arrangement would produce savings which should not vary substantially from those to be accomplished by ownership of the line (approximately $5,200,000 per annum), would present less complications and depend on fewer contingencies than any other plan, and could be made effective more expeditiously.
>
> Inclusion of the New Haven in the merged Penn-Central could also be accomplished by a lease of the New Haven properties to the merged company. That method was suggested to the Commission in June and July 1967 by Gruss, other bondholder representatives, and the States of Connecticut, New York, Rhode Island, and Massachusetts. It is the method specifically adopted by the Commission in its order dated August 1, 1967. It is one of the two methods set forth in the supplemental complaint of Gruss herein.
>
> A third method of including the New Haven on an interim basis is a conveyance of the New Haven properties to the merged Penn-Central, subject to existing liens, and subject to a final determination of the amounts payable by Penn-Central and of the amounts payable to lienholders in the pending proceedings before the Commission and the Reorganization Court.

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[4] Brief of Penn and Central in the merger proceedings dated June 1, 1964, at pp. 123-4.

That method is specified in the complaint and supplemental complaint herein, and was suggested to the Commission in the Gruss petitions filed on July 11, 1966, and in applications and briefs filed thereafter.

Through any one of these methods, and perhaps others as well, it would have been feasible to provide for the actual inclusion of the New Haven in the merged Penn-Central, at the time of the merger and as a condition precedent to its consummation, without any delay whatsoever. It is still feasible without substantial delay.

Originally, when the Commission found that the Penn-Central merger without inclusion of the New Haven would not be consistent with the public interest, and required a commitment by Penn and Central to include the New Haven, the Commission contemplated that inclusion would have occurred before January 1, 1968 (November 1967 Report, at p. 102). It was the New Haven Trustees, perhaps under pressure from Penn and Central, who waited to file their first plan for inclusion and fragment of a plan of reorganization until the last day of the six-month period fixed by the Commission, and failed to file the rest of their plan of reorganization for another ten months. Bondholders have borne the losses incurred by the New Haven Trustees during that period, but cannot be charged with causing the delay.

It is now the Commission, at the instance of Penn, Central, and the New Haven Trustees, that is tolerating and causing further delay by abandoning its program for inclusion by lease pending reorganization of the New Haven and the sale of its assets.

As shown in Point II below, the Commission has not provided for the actual inclusion of the New Haven in the

merged Penn-Central. Since it has not done so, consummation of the merger should be enjoined. *Baltimore & Ohio R. Co.* v. *United States,* 386 U. S. 372 (1967).

D. The Government motion (at p. 21) and the Penn-Central motion (at p. 17) cite *R. F. C.* v. *Denver & R. G. W. R. Co.,* 328 U. S. 495, 535-6, for the proposition that the public interest in the continued operation of the New Haven would have to be considered on any application for dismissal of the reorganization proceedings.

The point we make is that the constitutional and statutory rights of bondholders must also be considered. The Commission has closed its eyes to those rights, which have thus far been continuously denied in order to keep the New Haven alive. What we seek is a proper balancing of the public interest with the rights of bondholders, as required by this Court in the *Denver & R. G.* case, *supra,* and in the cases cited at pages 24-5 of our Jurisdictional Statement.

Over two and a half years ago the Reorganization Court said (Gruss Application for Stay, Appendix C, pp. 24-5):

> "Far from being indifferent to the public interest, the court has indulged that interest and allowed it to prevail over the creditors' rights for three and one-half years.
>
> * * * * *
>
> "The creditors have borne the onus of the public interest long enough".

POINT II

The November 1967 Report of the Commission is inadequate to provide for inclusion of the New Haven in the Penn-Central merger, and leaves the merger without the essential statutory finding of consistency with the public interest.

A. The Commission has now abandoned the machinery set up in its August 1 order "designed", as it told the court below, "to produce operation of NH by the merged company at the time of consummation".

The November 1967 Report:

(1) Approves the inadequate price offered by Penn and Central for the New Haven properties, free of all liens;

(2) Approves consummation of the sale as a first step in a "plan of reorganization" to be consummated without any vote of bondholders;

(3) Authorizes consummation of the Penn-Central merger without concurrent inclusion of the New Haven operations; and

(4) Purports to authorize the New Haven Trustees to borrow up to $25 million from Penn-Central and to issue Trustees' certificates, in the amounts borrowed, with a first lien on all properties and earnings of the New Haven prior to the liens of all mortgages.

In a conscious attempt to force the bondholders into abandonment of their constitutional and statutory rights to vote on a plan, to know (when they vote) its impact

upon their claims, and to obtain court review of adverse rulings by the Commission,[5] the November 1967 Report would impose upon them a growing proportion of operating losses pending consummation of the sale, and the entire amount thereof if the Commission order is reversed and the New Haven liquidated.

The Commission is responsible for the delay that has already occurred between July 11, 1966, and November 21, 1967, in passing upon the issue of immediate inclusion. The Commission rejected the July 1966 petition of Gruss for a hearing, then objected to the standing of Gruss to obtain judicial review in the court below and in this Court, objected to taking the case on remand even after this Court's remand in May 1967, purported to require "steps for immediate inclusion of the New Haven into Penn-Central by lease" by its order dated August 1, 1967, reopened the question in its order dated September 12, 1967, and finally issued its adverse decision in the November 1967 Report, which now requires additional review proceedings.

B. The November 1967 Report of the Commission also sets the stage for further delay of any sale of the New Haven properties, free of liens, to Penn-Central. From October 1966, before the first filing of a fragment of a plan by the New Haven Trustees, until September 1967, when a complete plan was first filed, Gruss pressed for the filing of a complete plan by the New Haven Trustees. In *Chase Manhattan Bank* v. *Smith*, 328 F. 2d 635, 640 (May 29, 1967), the Court of Appeals for the Second Circuit noted that the time required to be spent in preparing an orthodox plan would hardly equal that needed to defend an un-

[5] Among other indications of the Commission's purpose is the statement in note 39, at p. 103: "we are making provision to ward off the possibility of undue litigation by the creditor groups as best we can."

orthodox one, not to speak of the later hazard of failure at the end of a long path of judicial review. The court below noted that the New Haven Trustees, as a result of those "adverse intimations" by the Court of Appeals, had abandoned their attempt to effect inclusion as a first step in a two-step plan of reorganization. Appendix to Jurisdictional Statement in No. 778, pp. B-23-24.

The November 1967 Report now invites the loss of time and hazard of failure against which the Court of Appeals warned. The Commission ignores both the majority opinion and the dissenting opinion in *St. Joe Paper Co.* v. *Atlantic Coastline R.R.*, 347 U. S. 298 (1954). Whichever of those two opinions may represent the law of the future, any sale of the New Haven to the merged Penn-Central would require at least its submission to a vote of bondholders. The Commission ignores also the admonition of this Court in *Palmer* v. *Massachusetts*, 308 U. S. 79, 88 (1939) that the enormous powers exercised by the Commission and the courts under Section 77 of the Bankruptcy Act can properly be exercised only in the context of "a complete plan of reorganization for an insolvent road." The attempt of the Commission to disregard the constitutional and procedural rights of the bondholders can only lead to additional delay.

C. The Commission has no power, in the light of its finding on public interest, to authorize the merger of Penn and Central on terms that do not provide reasonable assurance of the actual inclusion of the New Haven in the merged company.

The purported authority to issue Trustees' certificates will not, in fact, keep the New Haven alive for later inclusion in Penn-Central. Such certificates, under Section 77 (c)(3) of the Bankruptcy Act, can be authorized only by the Reorganization Court. Their issuance cannot properly

be authorized without a full hearing on the alternative proposed by the Committee, that the reorganization proceedings be dismissed and the railroad liquidated. *Bankers Trust Co.* v. *Gebhart,* 195 F. 2d 238 (2d Cir. 1952). The punitive terms proposed by the Commission, with the penalty increasing with each month of loss operations, is enough to ensure the determined opposition of bondholders and their representatives. There is and can be no assurance that the Trustees' certificates will actually be issued, and without them there is no provision made for continuance of the New Haven operations, their inclusion in Penn-Central, or compliance with the statutory requirement of consistency with the public interest.

D. Bondholder opposition is further assured by the Commission's gross undervaluation of the New Haven and its gross overvaluation of the consideration proposed to be paid by Penn and Central to the New Haven Trustees when the bondholders' liens are cancelled.

We recognize that this Court cannot now be asked to pass upon considerations of value. The fact that the Commission chose to make its decision while this appeal was pending compels us to discuss the matter only to show that the questions involved are serious, will cause further delay, and still leave the ultimate fate of the New Haven unsettled.

The Commission's entire discussion of asset values (November 1967 Report, pp. 22 to 63) is skewed by setting forth the contentions of the New Haven Trustees and of Penn and Central as though they were adversaries. The Commission glosses over the fact that both are proponents of the same price under the same agreement, and that the New Haven Trustees are committed not to make any statement

or sign any document inconsistent with the provisions and the intent thereof.

Perhaps the most shocking example of dealing with valuation evidence can be seen in the discussion of the Grand Central Terminal properties at pages 51-58. The properties themselves were valued by an expert witness for the New Haven Trustees at approximately $227 million, with indications on the record that this was an unduly low valuation. The contention of bondholders that approximately 40% to 50% of that value belongs to the New Haven is barely mentioned at page 57. The Commission then capitalizes a fraction of the net income derived from those properties at a figure of 8%, pulled out of the air; averages the $20 million so computed against the $5 million "nuisance value" self-servingly assigned to the New Haven interests by Central; and emerges with a finding of value of approximately $13 million.

Most of that $13 million disappears when the Commission, at page 63, jumps to the conclusion that the liquidation value of the New Haven assets to be conveyed to Penn-Central is "about $125 million as of December 31, 1966", although its findings of values up to that point add up to approximately $133,500,000.

The Commission makes two equally speculative leaps in valuing the consideration to be received by the New Haven Trustees.

The major portion of that consideration consists of 950,000 shares of Pennsylvania Railroad stock, listed on the New York Stock Exchange and selling at prices from 10⅛ to 65 during the ten years 1956-1965, from 40½ (in October) to 73⅜ (in February) for the year 1966, and from 52¼ to 70¾ for the year 1967, 54⅞ to 56 on November 27, 1967. At pages 64-65 the Commission capitalizes the com-

bined net income of Penn and Central in 1965 (when neither railroad was paying income taxes because of prior losses),[6] adds anticipated merger savings (without reference to income tax thereon), states that the trend in the market price of Penn stock is clearly "up" (ignoring the 20% decline in that market price since February 1966), and simply adopts the speculative figure of $87.50 a share used by the New Haven Trustees, which is over $25 per share (over $25 million) higher than the present market.

Even adding that unsupported guess at how the market will value the Penn stock at some unknown date (p. 69) to the other values to the New Haven of the proposed consideration ($37,500,000, according to the November 1967 Report at pp. 65-68) one gets a total of only $120,600,000. Yet somehow the Commission jumps to a finding of "approximately $125 million" for the consideration to be received from Penn-Central.

If the New Haven were actually to receive $125 million from Penn-Central today, $8 million (and all retained assets) would be consumed in contract adjustments and payment of current liabilities; $66 million would be offset by senior securities required to satisfy prior claims (mostly unpaid administration expenses) as of August 31, 1967; and the first mortgage bondholders would receive common stock in a reorganized company having a book value of

---

[6] The combined consolidated net income of Penn and Central for 1965 was $124,316,000. For the first nine months of 1967 Penn reported consolidated earnings of $40,866,000, and Central reported a deficit of approximately $2,639,000. The November 1967 Report chooses to ignore those facts and the cyclical nature of railroad earnings. It adopts the position, which the Commission had correctly and emphatically rejected in 1966, that improved 1964 and 1965 incomes establish a trend toward permanent improvement in the finances of Penn and Central. 327 I.C.C. 475, 495-6 (April 6, 1966). (Cf. Motion of Penn and Central to Affirm in No. 835, pp. 13-14).

approximately $51 million, only 52% of their $98 million claim. Actually, the stock of the reorganized company would be worth less than $17 million, and that amount would be reduced as loss operations continue,[7] and would be further reduced if additional creditors (including Central)[8] establish their claims to priority.

The cost to Penn-Central is overstated by the Commission at $159 million, in large part by disregarding important values to be acquired by Penn-Central. On the Grand Central Terminal properties alone, worth upwards of $227 million, a fractional interest of 50% to 60% will be converted into 100% ownership. For income tax purposes, Penn-Central will acquire salable and depreciable properties which for tax purposes will have a basis approximately $130 million in excess of its cost to Penn-Central.

From the November 1967 Report (pp. 59-61) one would not even know that the evidence of tax advantages to Penn-Central (rejected by the Commission as "speculative") was presented by Mortimer S. Caplin, one of the leading tax experts in the United States, who served as Commissioner of Internal Revenue for over three years (Ex. NHI-105).

E. The cavalier treatment by the Commission, in the November 1967 Report, of the evidence presented and arguments made by bondholder representatives, and of the constitutional and statutory rights of bondholders, has as-

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[7] As of December 31, 1970, according to an exhibit submitted by the New Haven Trustees, claims ahead of the bondholders will have increased from $66 million to $86 million.

[8] Central is among the creditors, with claims aggregating approximately $5 million, who have appealed from a Reorganization Court order denying their asserted priority as six-months claimants.

sured further delay and probable frustation of any inclusion of the New Haven operations in the merged Penn-Central.

The Commission's approval of consummation of the merger, without concurrent inclusion of the New Haven, violates the basic requirements of the Interstate Commerce Act.

It was irrelevant for the Court below, in dismissing Gruss' complaint, to remark that the Commission had given "every indication of its intention" to prescribe some form of financial aid that will permit the New Haven's operations to continue beyond December 31, 1967 (Appendix to Jurisdictional Statement in No. 778, at p. B-29). Such an intention, whether laudable or not, does not satisfy the standards of Section 5 (2) of the Interstate Commerce Act.

Gruss, and other bondholder representatives, will promptly seek review of the Commission orders based on the November 1967 Report. Such review will, however, be futile if consummation of the Penn-Central merger is permitted before the review proceedings are terminated.

The order of the district court should be reversed. The case should be remanded to that court with instructions to restrain consummation of the merger of Penn and Central until the operations of the New Haven are included in the merged Penn-Central at least on an interim

basis, whether by lease or otherwise, pending completion of the New Haven's reorganization proceedings.

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November 30, 1967

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JOHN F. DAVIS,

IN THE

Supreme Court of the United States

October Term, 1967

No. 831

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,

Appellant.

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF APPELLANT NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE TO MOTIONS TO AFFIRM

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November 30, 1967

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The motions to affirm are dependent upon the Commission's recent November 16, 1967 Report (served November 21, 1967).* The issuance of that Report, at this time, requires an analysis of the Commission's past actions regarding the New Haven.

The Commission has, from the start, miscalculated its powers and confused the issues by erroneous assumptions

* It is understood that copies of the Report and accompanying orders have been furnished to the Court by Counsel for the Commission.

with respect to timetables and an absolute assurance, misplaced in fact, that it had the power to carry out a merger involving Penn-Central and the New Haven. The Commission's, Penn-Central's and the New Haven Trustees' assumptions as to the timetable of inclusion is described in the recent November 16 Report as follows:

> "Furthermore, when we approved the Penn-Central merger, anticipating that Penn-Central would enjoy some $80 million a year in merger savings, we were fully aware that the benefits would be diminished to the extent inclusion of the NH in the Penn-Central system was a negative financial factor. And, in this regard, language in our report, in the *NH Train Discontinuance* case, stating that 'there is no immediate likelihood of liquidation of the New Haven during 1966 or the next few months thereafter' (327 I.C.C. at 173), indicates that *we hoped and expected that Penn-Central would be taking over the NH's operations by this time.* On their part, it appears from the record that *Penn and Central anticipated,* when they reached agreement with the NH Trustees on the terms of the purchase agreement, *that the NH would be in their system by January 1, 1968*". (November 16 Report, slip opinion, p. 102) (emphasis added)

Those assumptions as to time have been frustrated, not by any action of New Haven creditors or security holders, but by events involving the misapplication of the Commission's powers with respect to other railroads. *Baltimore & Ohio R.R. Co.* v. *United States,* 386 U.S. 372 (1967).

In the first instance, the Commission had before it the application of the New Haven for the discontinuance of its passenger service. 327 I.C.C. 151 (1966). Had that application been treated on its merits, the discontinuance of the passenger service would have been granted, leaving the New Haven substantially a freight-only railroad. Such New Haven freight service would have been destroyed by the Penn-Central merger. Desiring the Penn-Central merger, the Commission did two things; it authorized the Penn-

Central merger and it denied the discontinuance application. This and this alone has (a) made it impossible for the New Haven to be reorganized in any other way than through a merger with Penn-Central; and (b) imposed continuing losses upon the New Haven, all of which have been borne by the New Haven creditors, and none of which have been borne by Penn or Central to this date. It is because the Commission foreclosed any other possibility of reorganization of the New Haven except through its inclusion in Penn-Central, that the New Haven now has no alternatives but inclusion in Penn-Central or the dismissal of the reorganization proceedings.

Error and miscalculation have now been "rescued" only by the compounding of errors. When the Commission denied the discontinuance applications of the New Haven it did so on the theory that the New Haven would soon be included in Penn-Central, 327 I.C.C. at page 173. Since the New Haven was not soon included in Penn-Central, it became necessary, from the Commission's point of view, forcibly to remove all obstacles to the inclusion although to this point of time the New Haven bondholders have not been the cause of the delay of the Penn-Central merger. The Commission has now determined to make it impossible for the bondholders to avail themselves of the halls of justice by imposing upon them such continuous losses that they will not be able to pursue their remedies in the courts. It is the New Haven bondholders that are being made to pay for the Commission's lack of foresight and its arrogation of powers never granted to it by statute.

By failing to require immediate inclusion and by limiting Penn-Central's participaion in the losses, but requiring the continuance of service, the Commission has imposed upon the New Haven bondholders the substantial losses of the next few years. By reducing Penn-Central's participation in the New Haven's losses with each passing year, (November 16 Report, slip opinion, pp. 105-106), while the

losses mushroom from year to year, it is apparent that the whole scheme of the Commission is to disable the creditors from pursuing their remedies.

The argument of Penn-Central that the inclusion of the New Haven was not at the heart of the Commission finding that the inclusion of all of the New Haven's operations in Penn-Central was the public interest justification for the Penn-Central merger is specious and circular. (Penn-Central Motion, pp. 12-14). The determination to include the New Haven passenger operations as well as freight operations in Penn-Central was simultaneous with the denial of the New Haven's discontinuance applications. The Commission could have granted the New Haven discontinuance applications, making possible the reorganization of the New Haven as a freight-only railroad. That would have offered to the New Haven a variety of rescue routes one of which at least would have been a possible merger with Penn-Central. If, however, the passenger service was discontinued, then the Penn-Central merger could not go forward, for that merger would have destroyed the New Haven's freight service. At that point at least, the New Haven was in the position of E-L, D&H and B&M when they were before this Court last year. The Commission desired to proceed with the Penn-Central merger. It therefore denied the New Haven any alternative means of survival except inclusion in Penn-Central and then it found that the Penn-Central merger was in the public interest because it saved all of the New Haven operations. That is the history. That the Commission and Penn-Central rewrite that history from time to time as to themselves convenient, is apparent. Penn-Central therefore argues, quoting the Commission, that the New Haven is almost dead and therefore is not entitled to indemnification or protection against diversion (Penn-Central Motion, p. 14). Had the Commission not concluded to force the New Haven into Penn-Central, passenger and freight together, "near death" would not be the situation of the New Haven today.

Penn-Central argues that the fact that the Commission could not have contemplated that any failure of inclusion by reason of action of New Haven security holders would have been permitted to frustrate the Penn-Central merger is evident from the fact that it authorized consummation of the merger although recognizing that inclusion would be subsequent to appropriate proceedings under the Bankruptcy Act (Penn-Central Motion, p. 13). The Commission, however, has argued that New Haven's protection against the Penn-Central merger rests on the fact that it has provided for inclusion. That is a significant part of the Commission's and Penn-Central's argument. How can it then be argued that the Commission, which justifies the approval of the Penn-Central merger and its consummation on the ground that the New Haven is protected, also rests part of its case on the ground that the merger should go ahead whether or not New Haven is protected?

It is not now and it never has been in the public interest for Penn-Central to merge if that merger involved the destruction of New Haven's railroad service. The continuance of the passenger service at the present level has brought the New Haven to its present crisis. The continuance of the passenger service at the present levels was justified by the Commission on the ground that Penn-Central would absorb the New Haven and soon. Yet now Penn-Central argues that it is in the public interest for the merger to go ahead whether or not the New Haven may be included and after other avenues of reorganization have been closed. It cannot be denied that the Commission intended that an essential benefit to be gained by permitting the merger of the New Haven's largest ally (Penn) with the New Haven's largest competitor (Central), was the preservation of the New Haven's services. This is made clear by the Commission in its recent November 16 Report as follows:

> "The Penn-Central merger (which will bring substantial dollar savings to the merger applicants)

> was approved with the thought that some of the merger savings would be available specifically to ward off a liquidation and shutdown of the NH so that adequate transportation service would remain available to the public which now relies on the NH." (November 16 Report, slip opinion, p. 63.)

If inclusion does not take place, those merger savings which the Commission intended to be used to "ward off" liquidation of the New Haven, will simply go into Penn-Central's pocket.

Is there any doubt that if this Court made it plain that the merger could not go ahead until by lease or otherwise the incubus of losses was lifted from the shoulders of the New Haven bondholders, that a lease containing such provisions would be entered into speedily by Penn-Central? Is there any doubt that the New Haven bondholders would support such a lease even that it gave to Penn-Central the right to petition for the discontinuance of certain unprofitable traffic? Thereafter, there would be left to be litigated only the question of whether the valuation and the consideration proposed by the Commission was fair and equitable and whether it was equitably distributed. None of this would affect the burden Penn-Central assumes nor the savings Penn-Central can make in the merger.

The Commission had already indicated that it never intended for Penn-Central to have to bear the losses to the extent the New Haven bondholders were expected to bear them. In its opinion approving the Penn-Central merger and requiring the inclusion of the New Haven in the merged system, it made plain that if Penn-Central asked for a discontinuance so that its burdens would be reduced, it would grant such a discontinuance unless the states or other authorities came forward with the necessary assistance so that

the merger savings of the Penn-Central would be left intact for the benefit of the public and the strength of the merged system.* The reason that the bondholders were required to carry these excessive losses was because the Commission found it easiest to cast the burden upon the weakest. What the Commission promised Penn-Central, it could have easily effected for the benefit of the New Haven. It did not do this, because the New Haven bondholders did not represent a group sufficiently powerful to bring the Commission into conflict with the local governments involved. In the first passenger discontinuance case, the Commission could have made precisely the same finding it warns the states it will make when Penn-Central applied. The losses therefore, even under a lease arrangement, need not continue at the level they presently stand at for the New Haven creditors. They can be reduced by the Commission's granting the relief to Penn-Central as leasee, that the Commission is prepared to grant Penn-Central as owner of the merged railroad.

The Commission, as we have shown, has counted on its power to include the New Haven in Penn-Central whether the security holders were for or against such a plan. It was this that brought the events we have described in its wake. But the Commission never had the power to compel such a merger. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954).

Despite the attempt of Penn-Central to slant the issue, the case of *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co., supra*, has nothing to do with liquidation. It does, however, have much to do with the question of whether there is a reasonable certainty of inclusion of the New Haven in the Penn-Central system. The District Court believed that inclusion might be prevented unless this Court chose

*At 327 I.C.C. 526, the Commission stated: "Thus, the inclusion of New Haven's passenger service shall in no way be applied or construed to mean that New Haven passenger deficit operations, if undue, must be borne by the savings resulting from this merger."

to follow the dissenting views of Justice Douglas (B&O J.S., B-24). In light of the Commission's November 16 Report, however, the situation is now one that cannot be supported by *either the dissent or the majority opinion in the St. Joe Paper Case.* The November 16 Report provides for the transfer of the New Haven assets to Penn-Central, in return for an "economic equivalent" *without* the submission of the proposal to a vote of the first mortgage bondholders of the railroad (November 16 Report, slip opinion, pp. 113-114, 116).

The plan of reorganization in the *St. Joe Paper Co. Case* had as its basic element, the transfer of assets of the Florida East Coast Railway (a debtor in reorganization under Section 77 of the Bankruptcy Act), to the Atlantic Coast Line Railroad in return for the distribution of cash and various types of Atlantic Coast Line securities to Florida East Coast's bondholders. The bondholders (the largest of which was St. Joe Paper Co.), who had been recognized as "in substance the owners of the debtor railroad" (347 U.S. at p. 301), objected to the plan. Justice Frankfurter's majority opinion struck down the plan and concluded:

> "We therefore conclude that the Commission does not have under Section 77 of the Bankruptcy Act a power which Congress has repeatedly denied it under the Interstate Commerce Act, namely to initiate the merger or consolidation of two railroads." (347 U.S. at p. 306)
>
> * * *
>
> "The crucial question, therefore, is whether this merger plan meets the statutory requirements. Since it does not, as we have found, because it is sought to be imposed by Commission fiat rather than proposed by the merging carriers, it matters not that the security holders might ultimately accept it if it were put to them for a formal vote. The kind of Hobson's choice, more or less, to which security holders are put when voting on a merger plan is not to be put to them on a plan initiated by the Commission rather than by their own corporation." (347 U.S. at pp. 313-14)

Justice Douglas' dissenting opinion put the issue thusly:

> "The one and only issue before us at the present time is whether the Commission may include in a plan of reorganization a provision that the debtor or bankrupt railroad should be merged with another road and *submit that plan for approval or disapproval to the security holders who are entitled to vote on a plan.*" (347 U.S. at p. 322) (emphasis added)
>
> • • •
>
> "So far as this record shows, the Commission has faithfully, painstakingly, and conscientiously performed the obligations which § 5 of the Interstate Commerce Act imposes on it. It would seem obvious, therefore, that the Commission should be allowed to submit the plan, including the provision for a merger, to the security holders for their approval or disapproval." (347 U.S. at pp. 327-8)

The Commission's plan as enunciated in the November 16 Report, reverts back to a procedure which had been abandoned by the New Haven Trustees after adverse warnings issued by the Second Circuit Court of Appeals in *Chase Manhattan Bank* v. *Smith,* 378 F. 2d 635 (2d Cir. 1967). According to the Commission's plan, the New Haven's assets will be transferred to Penn-Central for various securities considered by the Commission to be an "economic equivalent", *without a vote of any security holders.* Such a procedure is flatly contrary to both the majority and the dissenting opinions in the *St. Joe Paper Co. Case.*

To ignore the fact that inclusion of the New Haven into Penn-Central as proposed by the Commission is in violation of the principles enunciated by the opinions of this Court in the *St. Joe Paper Co. Case,* is to ignore reality. While no challenge to the November 16 Report has been filed to date, the Committee intends to promptly institute proceedings before a statutory District Court and the

Committee has been informed that all of the creditors and creditor representatives who have been most active in these proceedings also intend to so proceed.

While the Commission has issued its November 16 Report on the eve of the argument in this appeal in an attempt to divert the impact of arguments presented by the New Haven bondholders, a reading of that report shows that there is no likelihood of it being sustained in the courts. Not only does it completely disregard the *St. Joe Paper Co. Case, supra,* but its valuations and legal reasoning are woefully inadequate. The differences between the Commission's findings and the bondholders' claims are so substantial, that if the bondholders have even partial success on judicial review, the feasibility of inclusion will be open to serious question. The following two brief examples illustrate the nature and magnitude of some of the issues:

1. Value of the consideration.—The Commission has found that the shares of Penn common stock to be paid to the New Haven for its assets have a value of $87.50 per share (slip opinion, p. 65). That value is used despite the Commission's finding, four pages later, that the common stock is to be valued at "market value at the time of issuance" (slip opinion, p. 69). On November 21, 1967, the date of service of the Report, Penn common stock closed on the New York Stock Exchange at $54 ⅞ per share (New York Times Stock Index, Nov. 22, 1967). Penn stock has not even sold as high as $75 in the past ten years. If, as the Commission concludes, the value of the shares is $87.50, the 950,000 shares to be used as part of the purchase price, is $83.1 million. If one were to use a market value of $55 per share, the value of the 950,000 shares is $52.25 million. As a result, this issue of law alone involves a difference of more than $30 million. If the Commission is found to be incorrect, the result may be significant enough to upset the feasibility of the inclusion.

2. Grand Central real estate.—As recognized by the Commission, this real estate was appraised at $230 million (slip opinion, p. 57). That appraisal was based upon a capitalization of the income from the properties and Penn-Central does not take issue with the appraisal. The Commission has found that the New Haven's interest in these properties is substantial, whether or not the New Haven continues to run passenger trains into Grand Central station (slip opinion, pp. 51-58). The New York State courts have referred to the New Haven's interest in these properties as that of a "partner". *New York Central R. Co.* v. *New York, N.H.&H.R. Co.*, 13 A.D. 2d 309, 216 N.Y.S. 2d 928 (1st Dept. 1961), *aff'd*, 11 N.Y. 2d 1077, 184 N.E. 2d 194 (1962). The Commission found that transfer of New York Central's interest in the properties requires New Haven participation and that transfer of New Haven's interest requires Central's participation (slip opinion, p. 57). The proposed sale of the New Haven assets to Penn-Central includes a sale of New Haven's interest in this real estate. Instead of finding that the New Haven's interest is worth half of the appraised value, $115 million, to Penn-Central, the Commission came up with a clearly arbitrary value of $13 million. That was arrived at by capitalizing 40% of a figure representing net profit after the expenses of Central and New Haven for the running of trains, thereby arriving at $20 million, and then finding that the value lies between that figure and a $5 million figure that Central had admitted that it would pay as "nuisance value" for New Haven's interest. Since the difference between those two figures is $15 million, the Commission "split the difference" and found a "value" of $13 million (slip opinion, p. 58). The question of law regarding the Grand Central real estate involves a difference of $102 million! If the Commission is found to be incorrect on this item, the result may be significant enough to upset the feasibility of the inclusion.

The above two examples, coupled with the issues raised by the *St. Joe Paper Co. Case, supra,* make it evident that

inclusion of the New Haven remains uncertain and that the Penn-Central merger should not be permitted to proceed.

The New Haven Trustees argue that the Penn-Central merger should be permitted to be consummated because the bondholders are free to litigate the amount of interim participation in operating losses and the amount of the consideration to be paid (NH Trustees' Motion, pp. 22-23). But the bondholders are not free to litigate and they are not free to vote in a meaningful way on a reorganization plan. Because a failure of inclusion resulting from litigation or from a negative vote by the bondholders would, in the face of the Penn-Central merger and the refusal to permit the discontinuance of passenger trains that is linked with that merger, result in all of the interim losses falling upon the bondholders, those alternatives are realistically being taken away from the bondholders.

Conclusion

The Court should deny the motions to affirm, take jurisdiction of the appeal, reverse the order of the District Court and remand with instructions to restrain consummation of the Penn-Central merger unless and until the risk of New Haven's operations are assumed by Penn-Central between the date of consummation of the merger and the completion of the New Haven's reorganization proceedings.

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NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal from the United States District Court For the Southern District of New York

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REPLY OF BOSTON AND MAINE CORPORATION TO MOTIONS TO AFFIRM

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On Appeal from the United States District Court For the Southern District of New York

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REPLY OF BOSTON AND MAINE CORPORATION TO MOTIONS TO AFFIRM

Appellant, Boston and Maine Corporation (B&M), hereby replies to the motions of the United States, the Interstate Commerce Commission, Norfolk and Western Railway Company, and the State of New York [1] to affirm the

[1] While the Delaware & Hudson Railroad Corporation has moved in all of the consolidated proceedings for affirmance of that paragraph of the judgment below which dismisses B&M's complaint, D&H's motion does not argue against B&M's appeal in No. 833. Rather, D&H requests that any remand based on B&M's appeal should be "without prejudice to the right of EL and D&H to proceed to enforcement of the Commission's provision for their inclusion in N&W." B&M agrees with D&H in that regard (J.S. No. 833, pp. 19-20). Therefore, this reply does not respond to D&H's motion.

order and judgment of the three-judge court below insofar as it dismissed B&M's complaint.

N&W takes the position that no substantial question is presented by "B&M's belated attempts to discredit its own witness" since the control savings estimates presented by B&M's witness William Wyer "were fully accepted by the Commission." [2] N&W alleges that B&M's witness made a thorough study of control savings "under circumstances which obviously presented every incentive . . . to maximize his savings estimates . . . ." [3] N&W is incorrect. No such incentive was present. B&M sought and emphasized merger, as contrasted with control. B&M requested that, in the event the Commission should direct control, B&M be credited with merger savings because (a) N&W witnesses had revealed that N&W would substantially integrate the operations of subsidiaries under control, and (b) control would be a temporary arrangement followed by merger.

The State of New York admits [4] that the Commission believed that control savings would exceed those claimed by B&M's witness, but agrees with the district court that the Commission "was not bound to attempt to price these out into increased earnings without the aid of detailed evidence and B&M had not furnished this" (citing J.S., No. 779, B-55). New York also argues that B&M was afforded a fair opportunity to present its case to the Commission. Those contentions are discussed below.

The United States and the Commission urge summary affirmance on the ground that B&M's "objections are directed to matters committed to the expert judgment of the agency which are not appropriate for judicial review,

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[2] N&W Motion to Affirm, p. 2.

[3] Ibid.

[4] State of New York Motion to Affirm, pp. 22-23.

at least at this level." [5] They employ the tactic of dismissing lightly the challenges of B&M (and N&W) to terms of inclusion with the concession that B&M (and N&W) made "some effort to phrase [their arguments] in procedural terms." [6] Obviously the Commission's actions in this case are not proven "arbitrary and capricious" or "without rational basis" merely because B&M so designates them. However, analysis of the Commission's treatment of terms for B&M inclusion demonstrates that its performance here is of the type that gave meaning and content to those "procedural terms."

The *N&W Inclusion* case was unique because in it the Commission itself was called upon to *determine the type of inclusion* and *set the value* of the included railroads. The adversary parties, of course, could present evidence as to the basis on which the petitioners should be included (or excluded), and they could suggest terms of inclusion. As in the usual case, the Commission was charged with the task of determining whether the inclusions were in the public interest, but it could not take the further step of directing inclusion unless it arrived at terms of inclusion which were equitable and consonant with its findings as to public interest.

Even such precedent as *Schwabacher* v. *United States*, 334 U.S. 182 (1948), which stresses the affirmative nature of the Commission's responsibilities in rail consolidations, does not fully delineate the scope of the Commission's duty in this unique case, for it does not deal with situations in which the Commission is obliged to determine in the first instance both the type of consolidation which would take place and the value of the included lines upon such consolidation. The Commission concluded

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[5] Motion of United States and Interstate Commerce Commission to Affirm, p. 17.

[6] Ibid.

that the type of N&W-B&M unification it found would occur [7] as the result of its inclusion order was in the public interest, but failed to dictate inclusion terms which were consistent with its findings as to unification. Instead, it erroneously adopted terms of inclusion based upon a different and lesser degree of unification.

There is no validity to the claim of N&W that B&M is attempting to discredit its own witness when it objects to the Commission's failure to match its findings as to B&M's value with its findings that the inclusion is in the public interest because "substantial savings" and substantial unifications will occur. B&M's witness clearly spelled out the bases upon which he testified as to value. If the Commission had found that N&W would operate B&M under control as a non-integrated subsidiary, as he had hypothesized, then B&M would have no complaint over the use of Wyer's figures as to control savings. The Commission, of course, could not have directed B&M inclusion under those circumstances unless it also made the prerequisite finding that inclusion of B&M on that basis would serve the public interest.[8]

But the Commission did not agree with the Wyer hypothesis—it found that substantial, identified unifications would be realized. Accordingly, it was the Commission's

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[7] 330 I.C.C. 794.

[8] The Commission's finding that inclusion of the three petitioners is in the public interest was not a mere recitation. It drew essential support from subsidiary findings that specific unifications and "substantial savings" would occur. "[T]he term 'public interest' . . . is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities . . . ." New York Central Securities Corp. v. United States, 287 U.S. 12, 25, 26 (1932). Without the subsidiary finding of substantial unifications and savings, the Commission's public interest finding can not stand. Administrative Procedure Act, § 8(b), 5 U.S.C. § 1007(b).

duty, as this Court held in *Schwabacher*,[9] to see to it that B&M shareholders would be fairly compensated for the value they would contribute to the enlarged N&W system. Instead, the Commission arbitrarily and capriciously evaluated B&M shares on the basis of what B&M's dollar contribution would be if the operations of N&W's subsidiaries were not integrated.

If the Commission felt that it could not, on the record before it, determine the dollar value of the "substantial savings" it found, it was the Commission's *duty* to see to it that the record was completed. Mr. Justice Brennan observed in his concurrence in *Baltimore & Ohio* v. *United States*, 386 U.S. 372, 429 (1967):

> "The ICC is pre-eminently an agency 'directly and immediately concerned with the outcome of virtually all proceedings conducted before it. It is not intended to be a passive arbiter but the "guardian of the general public interest," with a duty to see that this interest is at all times effectively protected.' H.R. Doc. No. 678, Practices and Procedures of Governmental Control of Transporation, 78th Cong., 2d Sess., Vol. 9, p. 53 (1944); see *Southern Class Rate Investigation*, 100 I.C.C. 513, 603. It is empowered to investigate and gather evidence beyond that presented by the parties where exercise of that power will advance the determination of what best serves the public interest. [citing, *inter alia*, *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U.S. 194, 208-10, 212, 216-17]"

A suggestion by the Commission to the parties that it wished to consider evidence as to savings (and traffic gains) under the type of control arrangement it found would occur would have brought an immediate response from B&M and, we are certain, from its co-petitioners and adversaries as well.

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[9] 334 U.S. 182, 199 (1948).

Should both of N&W's appeals prevail, the Commission's failure to set a reasonable value for B&M will do severe damage to the public interest (1) in delaying the public's realization of the benefits of the Penn-Central merger, (2) in delaying the inclusion of some or all of the three smaller carriers in N&W, and (3) possibly in the cessation of the service of the New Haven. It is B&M's view that the Commission error, serious though it is, can be remedied by remanding only the question of the terms for B&M inclusion to the Commission while permitting prompt realization of the other transactions at issue.

CONCLUSION

The Commission's ultimate finding was that B&M's inclusion in N&W is in the public interest and should be directed on specified terms which the Commission called equitable. Those terms were based upon a computation [10] which credited B&M with a contribution to annual system savings of only $328,471, a figure based expressly upon the assumption that the most minimal savings would be realized.[11] That finding is without rational basis in, and indeed conflicts with, the Commission's subsidiary findings that substantial savings will result from identified and far-reaching unifications. The Commission acted arbitrarily and capriciously in applying the dollar figure for minimal savings in the face of its finding that substantial savings would occur. The case should be remanded to the Commission for further proceedings as to B&M's contribu-

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[10] 330 I.C.C. 821, 857-58.

[11] 330 I.C.C. 857. There, savings resulting from N&W control of B&M are placed at $328,471 per year. As explained in B&M's briefs and Jurisdictional Statement, a correlative error occurred with regard to traffic gains.

tion to N&W system savings and as to its correspondingly greater contribution to N&W system traffic gains or, alternatively, for denial of B&M's petition for inclusion on the ground that the Commission has failed to find terms of inclusion equitable to B&M.

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November 30, 1967

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No. 834

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Supreme Court of the United States

OCTOBER TERM, 1967

READING COMPANY,

Appellant

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF APPELLANT READING COMPANY TO MOTIONS TO AFFIRM

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November 30, 1967

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REPLY OF APPELLANT READING COMPANY TO MOTIONS TO AFFIRM

None of the parties has contested the legal duty of the Interstate Commerce Commission to consider the effect of this merger transaction upon adequate transportation service to the public. There is also no question that Reading provides the public with an essential transportation service. The principal issue joined is whether the Commission is warranted, under the peculiar facts of this case, in disregarding at this stage the effect of the merger on the future of Reading's service. Without conceding the relevancy of delay, some inaccuracies expressed or implied in appellees' version of the facts will be corrected.

The factual situation will also be brought up to date in the light of the Commission's Second Supplemental Report,

dated November 16, 1967 and issued November 21, 1967, copies of which are now on file with the Court, wherein the Commission denied Reading's request for the Appendix G conditions to offset traffic diverted by reason of inclusion of New Haven in Penn-Central.

Since so much emphasis is focused on the timing of Reading's request for protection, the contentions of appellees should also be evaluated in the perspective of time. It has been more than eighteen months since Reading first asked for protection equal to that of other small railroads. In this period, the Commission had ample opportunity to hear and consider Reading's evidence without any delay in the termination of its procceedings. And now that Reading is willing to be heard after consummation, delay is eliminated as an issue. Certainly, the risk that the public dependent upon Reading's service will be prejudiced unless Reading is adequately protected outweighs any slight inconvenience to the Commission and the parties if Reading is heard now.

READING ACTED TO OBTAIN SPECIAL PROTECTION AS SOON AS IT REALIZED IT NEEDED THAT PROTECTION AND THAT SUCH PROTECTION WAS AVAILABLE.

While Reading has admitted freely that it did not claim protection or inclusion during the first part of the proceedings because it believed that it too would soon be merged, the effort in the motions of the Government and Penn-Central to make it appear that Reading slept on its rights after Appendix G was created is not warranted by the record.

Reading asked for the Appendix G conditions as soon as it had knowledge of their existence. In its petition for reconsideration and further hearing filed promptly after the Appendix G conditions were first imposed, Reading

stated "that the affirmative finding that the Penn-Central merger will not be detrimental to Reading must be reconsidered after Reading is given an opportunity to show the effect of the Penn-Central merger upon it" and requested that it receive the protection of Appendix G if those conditions should be retained.[1]

Reading brought this action initially in the District Court to obtain an interluctory injunction which would postpone the merger until Reading was heard concerning the lawfulness of the protective conditions prescribed for others and the merit of its own claim for similar protective conditions. In its brief in the District Court, Reading explicitly argued that "if such indemnity conditions are to be prescribed for anyone, they must be prescribed for the . . . Reading" (p. 8).

When the case first reached this Court, Reading joined in the briefs and argument of the other unprotected railroads because it was in agreement with those railroads that the merger ought not to occur until the future of the protective conditions was resolved. Penn-Central's statement that Reading did not even "mention" that the Commission had refused to hear evidence showing that the protective conditions were essential to preserve adequate service for the public is incorrect (M.A. at 2).[2] Its position in this respect was specifically described in its joint brief as follows:

> "At the hearing currently being conducted on the formulation of protective conditions, the Commis-

[1]The United States, in contrast to its position here, replied to the petition of Reading and others by agreeing that the Commission should grant a rehearing to consider evidence that the Penn-Central merger will seriously injure them. Even when the case was last before the District Court, the United States agreed with Reading that the Commission was bound to consider Reading's objections "[i]f there were any merit to Reading's assertion". However, when it assumed the Commission's role and evaluated Reading's claim, it "found" Reading would not be adversely affected (Memorandum of United States served August 28, 1967, at 4).

[2]"M.A." refers to Penn-Central's Motion to Affirm.

> sion has refused even to receive evidence showing that Reading and CNJ would also suffer losses to such an extent that protective conditions are required to protect the public interest in adequate transportation service (I. C. C. Order in Finance Docket 21989 dated November 10, 1966). The Commission again relied upon a theory of laches (see J. S., App. B, p. 24). Such a theory has no place in the consideration of protection needed in the public interest. See *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 80 (1934)." (Brief for Appellants, No. 642, at 28).

Penn-Central suggests that Reading is now carrying the standard borne by CNJ when the case was last here but discarded by that road when bankruptcy relieved it of the fetters of C&O-B&O control. CNJ is not in the appeal because it is negotiating protection from the merger. Penn-Central says that negotiations concern only protection from New Haven's inclusion in Penn-Central. However, Penn and Central have agreed to bring CNJ into the Penn-Central system if negotiations between CNJ and C&O-B&O for inclusion of CNJ do not secure CNJ's future.[3] This is the ultimate protection of CNJ whereof Reading spoke in its Jurisdictional Statement—a protection far greater than the

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[3] "In this connection, upon the initiative of the Trustees, negotiations have taken place with representatives of the Penn and the Central. Those roads have agreed that, if further negotiations with the C&O-B&O do not, reasonably promptly, result in an arrangement that will secure the future of the CNJ, the Penn and the Central would cooperate with the CNJ, through appropriate procedures that would not hinder consummation of the Penn-Central merger, to bring CNJ into the Penn-Central system. Final determination of the requirements of the public interest is, of course, for the Commission." (Reply Brief on behalf of Trustees of CNJ with respect to inclusion of the New Haven, Finance Docket No. 21989, et al., at 7).

interim protection afforded by Appendix G. Thus Reading is the only unprotected small road remaining.

Penn-Central's criticism of Reading's failure "to seek inclusion" in C&O-B&O at the time of the C&O-B&O Control case (317 I. C. C. 261 (1962)), the hearing in which terminated before the Penn-Central application was even filed, taxes Reading with an obligation to have foreseen that B&O's plans to merge with Reading would be supplanted by the N&W-C&O/B&O proposal.[4] At that time Penn, Central, the Commission and the industry generally expected three Eastern rail systems with Reading securely in the C&O-B&O System.

Penn-Central's representation that "Reading makes no attempt to explain" why it had every reason to expect protection from this and other mergers by inclusion in B&O cannot be taken seriously. These reasons—the long "family" relationship, joint Reading-B&O merger studies in 1963 and an increase in B&O's stockholdings in Reading while Penn-Central was before the Commission—are all detailed in Reading's petition in Western Maryland Control, attached as Appendix C to Reading's Jurisdictional Statement, and as an appendix to Reading's Second Supplemental Complaint.

The effort of Penn-Central to make it appear that Reading delayed in seeking the Appendix G conditions after they were invented is factually unsupported.

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[4]If the Commission properly prescribed conditions for PRR's subsidiary, Lehigh Valley, notwithstanding the absence of any request, because Lehigh Valley, as Penn-Central suggests (n. 7 at 8), "might reasonably have been thought to be in no position adequately to represent its own separate interest", the Commission might well have done the same for Reading in C&O-B&O Control or even in Western Maryland Control. Reading's petition to bind C&O-B&O in the latter case has been before the Commission for more than seven months. So far, the Commission has refused to hear Reading in *any* proceeding.

READING NEVER CONCEDED THAT THE MERGER WOULD NOT HARM ITS ABILITY TO SERVE THE PUBLIC

It is contended by both the Government and Penn-Central that Reading conceded that it would not be seriously affected by the merger. This is based solely on a letter of Reading's President concerning a *single* category of traffic at *one* interchange point. There is no statement in that letter that other traffic will not be affected; and if there were such a statement it would be wrong. Actually that single category alone would produce an annual revenue loss to Reading of about $2.7 million which could be disastrous to a company whose present operating deficit is in excess of $5 million for the first nine months of this year.

The letter made no reference to the loss of traffic which Reading originated or terminated at points competitive with PRR for the simple reason that no study had then been made of that traffic.[5] The potential for diversion of this kind of traffic in Reading's case is enormous because Penn competes with Reading at just about every significant point on its system and, after the merger, Penn-Central will be able to provide single-line service with a large pool of modern equipment between Reading's territory and all the points now served by Central. When this kind of traffic is added to the other kinds of traffic which Reading could lose to the merged company, the total traffic loss could be $19.9 million annually.

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[5]The divertibility of traffic at points where there is face-to-face competition is more difficult to study than the losses of interchange traffic. Records of the latter are maintained in the regular course of business, but determination of the former requires detailed analysis and study. Since Reading-Central interchange records were on hand, Reading's President estimated how much of that traffic would be lost. But since it was not opposing the merger, it made no detailed study of its other divertible traffic.

The District Court, usurping the Commission's function, found Reading's evidence "scarcely persuasive" despite the Commission's refusal to hear it. The error of so doing is demonstrated by the Commission's reliance on the same kind of diversion study in its Second Supplemental Report dealing with New Haven's inclusion in Penn-Central. ~~"may reasonably be expected from NH's inclusion in the~~

In that report the Commission found that diversion of approximately $845,057 in annual revenues from Reading may reasonably be expected from NH's inclusion in the Penn-Central system" (p. 129). The Commission expressly included in this figure divertible forwarded or terminated traffic of Reading. This is precisely the same kind of traffic which Reading says would be heavily diverted as a result of the Penn-Central merger itself. But in its Second Supplemental Report, the Commission adhered to its prior position and refused to determine the cumulative effect of the merger and New Haven's inclusion in the transaction. If it had done so, it obviously would been compelled to find that Reading would suffer diversion of traffic in a volume so large as to require offsetting protection of the type in Appendix G.

The Commission's refusal to consider Reading's losses of traffic to Penn-Central for any purpose has resulted in an absurdity. There is now a specific finding that over $845,000 of Reading's traffic would be lost solely by reason of inclusion of New Haven. If, as contemplated, D&H is granted trackage rights over portion of the lines of Penn-Central which go right through the heart of Reading's territory, Reading will have a further additional loss of traffic. However, without the knowledge of how much traffic will be lost to Penn-Central, the impact of these additional sums cannot be evaluated.

The Commission's duty under the statute and the national transportation policy is to assure the existence of a system of transportation adequate to serve the needs of the public. Reading's role in that system cannot be known unless the Commission determines the net competitive effect on Reading of Penn-Central and other rail realignments. The Commission's findings concerning small segments of the total effect on Reading will not protect the public or attain the legislative objective.

CONCLUSION

For the foregoing reasons, the motions to affirm should be denied.

Respectfully submitted,

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No. 835

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Southern District of New York

---

REPLY TO MOTIONS TO AFFIRM

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REPLY TO MOTIONS TO AFFIRM

STATEMENT

Appellants City of Scranton and Milton J. Shapp request that the Court deny the various motions to affirm[1] their dismissal with prejudice in the lower court's Penn-Central

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[1] Submitted by I.C.C.-U.S., PRR-NYC, New Haven Railroad, D&H, State of New York, Commonwealth of Pennsylvania, and jointly by States of Connecticut, Massachusetts and Rhode Island.

case. The underlying thrust of the appellee motions is that meaningful judicial review of the basic validity of the Penn-Central and N&W Inclusion orders of the I.C.C. should be hastily by-passed in the rush to find a "haven" for the New Haven.

Scranton and Shapp were dismissed with prejudice by the court below in the Penn-Central action because they declined to attack Penn-Central and N&W Inclusion in separate proceedings. The two orders were conceded by the U.S. and I.C.C. to be "wholly interrelated," "completely intertwined" and "inextricably intertwined."[2] Contrary to the assertions of U.S.-I.C.C., Scranton and Shapp did not seek to transfer their Penn-Central action to another district court,[3] to avoid a final hearing on the merits of their case in the court below,[4] or to avoid a forum that had expressed an unfavorable opinion as to the merits of their position.[5] Scranton and Shapp had informed the court below on several occasions that their case could only be heard properly on a combined pleading, briefing and hearing schedule embracing both I.C.C. orders. This was not done.

It was I.C.C.-U.S. and PRR-NYC, later joined by other railroads, that insisted upon separate judicial review for Penn-Central and for N&W Inclusion, although the two

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[2] I.C.C.-U.S. Memorandum in Support of Motion for Injunction, filed July 20, 1967 in the court below.

[3] I.C.C.-U.S. Motion to Affirm, p. 16. Transfer could not be had in any event. *New York Central R.R.* v. *United States*, 200 F. Supp. 944 (S.D.N.Y. 1961).

[4] PRR-NYC Motion to Affirm, p. 2.

[5] PRR-NYC Motion to Affirm, p. 9.

I.C.C. orders are wholly interrelated, completely intertwined and inextricably intertwined. These parties went to great lengths to preclude Scranton and Shapp from attacking Penn-Central and N&W Inclusion in a consolidated action in any court,[6] and secured a stay of proceedings despite the mandate of this Court for expedition in all matters arising out of the Penn-Central and N&W Inclusion orders.[7]

Judicial review of Penn-Central and N&W Inclusion in a consolidated action is entirely different from separate actions, as below, even though in a single court. It is not a mere "housekeeping detail" as suggested by PRR and NYC.[8] A consolidated action permits the full impact of the required inclusion (N&W Inclusion) to be considered in evaluating whether the order making necessary the inclusion (Penn-Central) should be set aside. On the other hand, the "domino" theory of the lower court, whereby Penn-Central is heard first, then N&W Inclusion, followed by whether Penn-Central should be further enjoined, is a

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[6] The PRR-NYC contention that appellants' present position on consolidation is dictated by exigency rather than conviction, based upon a reply to Reading filed May 9, 1967 by Scranton with the I.C.C. involving a general consolidation in the Eastern District without further hearings (PRR-NYC Motion, p. 11), disregards the fact that it was generally understood that the I.C.C. would consolidate Penn-Central and N&W Inclusion for decision. At least this is the way matters looked in the immediate period subsequent to the March 27, 1967 decision of this Court in *B. & O. R. Co.* v. *United States.* Scranton filed its own petition on May 9, 1967 requesting further hearings in all pending Eastern railroad unification proceedings and stated no objection to consolidation on that basis. That petition has been reproduced as an appendix to plaintiffs' brief in the *Moosic* case which was filed November 29, 1967.

[7] 386 U.S. at 392 (1967).

[8] PRR-NYC Motion, p. 10.

prejudicial method of dealing with two wholly interrelated, completely intertwined and inextricably intertwined actions.

Never having been parties to the lower court's N&W Inclusion action, Scranton and Shapp participated in the combined action attacking that order and the Penn-Central order which Borough of Moosic instituted in the Middle District of Pennsylvania. That action is presently scheduled for final hearing on December 15, 1967.

UNDERLYING NECESSITY FOR PROPER JUDICIAL REVIEW

Procedural aspects of this case are not to be glossed over. "Experience teaches, however, that the affording of procedural safeguards which by their nature serve to illuminate the underlying facts, in itself, often operates to prevent erroneous decisions on the merits from occurring." (*Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963))

This Court found it necessary heretofore to reverse the denial of an interlocutory injunction by the statutory court because the record showed a finding by the I.C.C. for the need of interim protection of certain railroads, and yet the I.C.C. had permitted consummation of the merger without such protection.

Neither this Court nor the statutory court in dealing with the denial of the interlocutory injunction itself claimed to have passed upon the merits. In the subsequent action of

the statutory court, its only attention to any of the merits was by way of what it considered a gratuitous footnote.[9]

This court, sitting as a court of review, has not had the basic benefit of a real determination by the court below on the merits of the controversy. This court should not permit by default the consummation of the most monopolistic amalgamation of competing systems in the economic history of the United States.

A final hearing on the merits of the two admittedly inextricably intertwined orders is presently listed before the statutory court in Pennsylvania. A determination by that court accompanied by findings of fact and conclusions of law will allow for appropriate judicial review. The wild cry for immediate relief to benefit the New Haven system should not debar procedural safeguards which experience teaches is a necessary concommitant of appropriate judicial review.

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[9] The lengthy PRR-NYC motion to affirm the dismissal of Scranton and Shapp with prejudice is largely devoted to a footnote in the opinion of the court below. The footnote (No. 778, J.S., B-9, fn. 6) purports to rule that appellants' attacks on Penn-Central simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission. PRR and NYC now urge that this Court go beyond the footnote and review the merits of Penn-Central based upon briefs filed in September, 1966 via a summary judgment proceeding in this Court. (PRR-NYC Motion, pp. 11-24) PRR and NYC have such a motion for summary judgment pending in the district court at Scranton, Pa. N&W Inclusion was not even the subject of a recommended report in September, 1966.

CONCLUSION

For the foregoing reasons, the motions to affirm should be denied, and this court should make any necessary orders as will insure that the public interest be heard in some district court.

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APPENDIX

CHRONOLOGY OF PRINCIPAL EVENTS SINCE JUNE 12, 1967 SPECIAL RELEASE OF I.C.C. ORDERS

	Action
12, 1967	I.C.C. releases PRR-NYC and N&W Inclusion reports.
13, 1967	N&W files action against N&W Inclusion in U.S.D.C.-W.D. Va.
16, 1967	U.S.-I.C.C. and railroads meet in chamber with S.D.N.Y. judges. Court agrees to entertain motions and sets hearing.
23, 1967	D&H attacks terms of N&W Inclusion in S.D.N.Y.
26, 1967	Moosic files consolidated action against PRR-NYC and N&W Inclusion in M.D. Pa.
27, 1967	Response to S.D.N.Y. Show cause orders filed.
28, 1967	S.D.N.Y. Hearing on motions to require Scranton and Shapp to supplement complaints.
3, 1967	Hearing set for July 7, 1967 by M.D. Pa. on Moosic request for injunction of both I.C.C. orders.
3, 1967	S.D.N.Y. enjoins PRR-NYC. Sets July 17, 1967 for Supp. complaints; August 8 for briefs and September 18 for hearing in PRR-NYC.
7, 1967	Hearing in M.D. Pa. on I.C.C.-U.S. and PRR-NYC motions for stay. I.C.C. postpones effective date for N&W Inclusion.
0, 1967	Hearing in W.D. Va. on I.C.C.-U.S. motion for stay.
1, 1967	M.D. Pa. grants stay of all proceedings until October 1, 1967 or further order of court.
4, 1967	W.D. Va. sets briefing schedule for N&W Inclusion; Reserves issue of stay for late September.
7, 1967	M.D. Pa. grants show cause order for filing Moosic briefs in M.D. Pa. based upon W.D. Va. action.

July 17, 1967	Scranton and Shapp move S.D.N.Y. for leave withdraw from PRR-NYC.
July 20, 1967	I.C.C.-U.S. move S.D.N.Y. to (1) enjoin Scr ton, Shapp and N&W from participation in M. Pa. and W.D. Va.; (2) Join N&W as involunt plaintiff to D&H's N&W Inclusion action; and (to establish separate pleading and briefing sch ule in N&W Inclusion identical with W.D. Va.
July 25, 1967	S.D.N.Y. hearing on I.C.C.-U.S. motions a Scranton, Shapp request to withdraw.
July 26, 1967	Rulings on motions. Scranton-Shapp given un August 2 to file supplemental complaints in PR NYC and to file briefs on August 8. Schedu establishing for N&W Inclusion to begin af release of I.C.C. report on reconsideration N&W Inclusion.
July 28, 1967	M.D. Pa. denies motion to vacate stay.
August 2, 1967	Scranton and Shapp file statement of objectio to S.D.N.Y. order in PRR-NYC.
August 7, 1967	Moosic case plaintiffs request stay be vacat based upon railroad briefs in S.D.N.Y.
August 14, 1967	I.C.C. issues report on reconsideration in N& Inclusion. N&W Inclusion pleading and briefi schedule commence in S.D.N.Y. and W.D. Va.
August 30, 1967	M.D. Pa. denies Moosic plaintiffs motion to v cate stay.
September 18, 1967	S.D.N.Y. hears PRR-NYC.
September 28, 1967	S.D.N.Y. hears N&W Inclusion.
October 19, 1967	S.D.N.Y. decision released.
November 9, 1967	U.S. Supreme Court stays consummation of PR NYC.
November 9, 1967	M.D. Pa. orders briefing and hearing schedule o permanent injunction of PRR-NYC and N& Inclusion.

No. 836

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Supreme Court of the United States

October Term, 1967

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
AID ASSOCIATION FOR LUTHERANS,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF BONDHOLDERS

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November 30, 1967

Supreme Court of the United States

OCTOBER TERM, 1967

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
AID ASSOCIATION FOR LUTHERANS,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,

Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF BONDHOLDERS

Both N&W and the ICC, in their motions to dismiss, assert that the Bondholders-Appellants seek merger of EL and N&W. This, of course, is erroneous. No Bondholders have presented such a plan at any stage of these proceedings.

On the contrary, the Commission has considered a plan involving control of EL by N&W and has approved that plan. But the Commission has not clearly reserved jurisdiction to protect Bondholder-Appellants if N&W attempts to obtain the fruits of merger at the Bondholders' expense. The Commission's brief, as did the court below, adverted to the power of courts of equity as adequate protection.*

* ICC Motion, p. 19n. 13.

That is irrelevant. Appellants are entitled to protection under §5(2) of the Interstate Commerce Act regardless of whether courts of equity are empowered to protect them.

It is our position that under §5(2) the Commission has a duty to provide that protection by reserving jurisdiction to grant relief to EL's bondholders should N&W abuse its power. This is essential in the situation presented here, where the Commission has approved absolute control of EL by N&W, with every incentive to N&W to use that control in its own interest and against the interest of EL's Bondholders. The opportunity to exercise that incentive is most obvious, since EL's main line from Buffalo to Chicago is paralleled by N&W track. If N&W were to appropriate for itself part of EL's traffic, this could enable N&W to avoid interest payments on EL's income bonds for the entire life of the bonds. In the Examiner's Report, Commissioner Webb recognized this type of problem and pointed out:

> "N&W, in its own interest, may manage new D&H Co. in such manner as to weaken its ability to fulfill its obligations" (Report, p. 140).

EL also moved to affirm despite the lack of legal interest of EL's management in either the grant or denial of the relief requested by Appellants. EL claims that the bondholders have never said what their vital interests were. As Appellants have pointed out in their Exceptions, their briefs below,* and their Jurisdictional Statement herein, this interest is in preventing the appropriation of their security and diversion of EL's earnings.

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* See especially pages 4-5, 12, 20-29 of Bondholder-Appellants' main brief below; pp. 2-3 of our Exceptions to the Commission.

EL also asserts that Appellants have not said how their rights will be infringed. This, too, is error, for Appellants have consistently pointed out that control will enable N&W to divert traffic and income from EL to N&W.*

Finally EL asserts that Appellants "have never stated . . . what, if anything, the Commission ought to do or ought to have done to protect them—except . . . to retain jurisdiction. . . ." Though Appellants have suggested additional relief, that statement of EL is correct to the extent that reservation of jurisdiction to afford future protection to Bondholders is precisely the protection sought. It is the minimum to which Appellants are entitled under §5(2). There is no ground, procedural or substantive, in any of the motions which would serve as a valid basis for refusing this relief.

Yet despite the fact that, within the time allowed by law, the Bondholders did, with ICC permission, intervene, become parties and file exceptions on this precise point, the Commission completely ignored their exceptions and failed even to make any findings thereon as undeniably required by law.** The court below never dealt with this point, but instead incorrectly asserted, without basis in record or in fact, that Appellants had not timely intervened. This was clear-cut error.

We submit that, as set out in our Jurisdictional Statement, the dangers to our rights are clear and the need for a reservation of ICC jurisdiction for our protection is also clear. Both the ICC and the court below simply failed to consider our rights. This failure was error.

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* *Ibid.*

** 5 U. S. C. §557(c).

We further submit that this error is so plain—indeed undenied by any party hereto—that in light of the need for expedition, no remand for reconsideration to the court below is necessary.

Conclusion

We submit that the Court should clarify, and if necessary remand to the ICC, so much of the final order in F.D. No. 21510 as deals with post-consummation relief, in order to make clear the ICC's continuing jurisdiction to give EL Bondholders relief, on application, should future developments prove that to be necessary and equitable.

November 30, 1967

Respectfully submitted,

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SEP 15 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 663 Misc.

BOROUGH OF MOOSIC, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents*.

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND MOTION FOR LEAVE TO FILE, AND MOTION TO INCLUDE RECORD IN NO. 433, CITY OF POTTSVILLE V. UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. Misc.

BOROUGH OF MOOSIC, *Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents.*

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI

Now comes petitioner Borough of Moosic, a municipality located in Lackawanna County, Pennsylvania, and respectfully moves this Court for leave to file the annexed petition for writ of mandamus or certiorari under Section 1651 of Title 28, United States Code, directed to the District Court of the United States for the Middle District of Pennsylvania, directing the

Honorable Francis L. VanDusen, C.J., Michael H. Sheridan and William J. Nealon, D.D.J. to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, or in the alternative that this Court review the orders of the United States District Court for the Middle District of Pennsylvania entered July 11, 1967, July 28, 1967 and August 30, 1967 in No. 10054 Civil, *Borough of Moosic, et al.* v. *United States, et al.*, and for such other and further relief as may be just and proper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. Misc.

BOROUGH OF MOOSIC, *Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents.*

MOTION TO INCLUDE RECORD IN NO. 433, CITY OF POTTSVILLE V. UNITED STATES

Now comes petitioner Borough of Moosic, a municipality located in Lackawanna County, Pennsylvania, and respectfully moves this Court that the record of the United States District Court for the Middle District of Pennsylvania heretofore submitted with the appeal in No. 433, *City of Pottsville* v. *United States,*

be included by reference in its petition for writ of mandamus or certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. Misc.

BOROUGH OF MOOSIC, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents*.

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND THE HONORABLE FRANCIS L. VAN DUSEN, MICHAEL H. SHERIDAN, AND WILLIAM J. NEALON, JUDGES FOR THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Borough of Moosic, a municipality located in Lackawanna County, Pennsylvania, prays that a writ of mandamus or certiorari issue to review the action of the United States District Court for the Middle District of Pennsylvania in staying all proceedings in No. 10054-Civil, *Borough of Moosic, et al.* v. *United*

States, et al., a single action which seeks to set aside two separate orders of the Interstate Commerce Commission (I.C.C.) dated June 9, 1967 and served June 12, 1967, approving and authorizing the merger of The Pennsylvania Railroad Company (PRR) and The New York Central Railroad Company (NYC) and requiring the inclusion of Erie-Lackawanna Railroad Company (E-L), The Delaware and Hudson Railroad Corporation (D&H) and Boston and Maine Corporation (B&M) into the Norfolk and Western Railway Company (N&W), and that the Supreme Court of the United States direct the said United States District Court for the Middle District of Pennsylvania to proceed forthwith to hear and to determine the said complaint of Borough of Moosic.

OPINIONS BELOW

The order of the District Court granting the motion of the United States and intervening defendants for a stay of further proceedings was entered July 11, 1967 and is reproduced herein in Appendix A.

The per curiam Memorandum Sur Motions of Defendant and Intervening Defendants for a Stay was entered July 13, 1967, and is reproduced herein in Appendix B.

The order of the District Court denying petitioner's Motion to Vacate Stay was entered July 28, 1967 and is reproduced in Appendix C.

The further order of the District Court denying petitioner's Motion to Vacate Stay of Proceedings and Establish A Briefing Schedule was entered August 30, 1967 and is reproduced herein in Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1651(a). Exclusive appellate jurisdiction is conferred upon this Court by 28 U.S.C. Section 2325 and Section 1253 of actions to enjoin and to set aside orders of the I.C.C., and this writ is sought in aid of such exclusive appellate jurisdiction.

QUESTION PRESENTED

Whether the three orders of a three-judge District Court staying further proceedings in a single suit attacking two separate orders of the Interstate Commerce Commission, constitute an abuse of judicial discretion where

(a) The United States and Interstate Commerce Commission are in agreement that both I.C.C. orders are "inextricably intertwined", "wholly interrelated" and "completely intertwined";

(b) the suit pending in the District Court is the only suit in any court attacking both I.C.C. orders in a single consolidated proceeding;

(c) the pending action in the District Court is the only suit attacking the two I.C.C. orders on public interest grounds, and it is clear that such grounds are outside the scope of the litigation pending in other jurisdictions;

(d) petitioner could not intervene as of right in other jurisdictions and raise the issues presented by its suit, but brought its suit in the Middle District of Pennsylvania, the only forum provided by Congress for petitioner's suit (28 U.S.C. 1398); (See also: *New York Central R. Co.* v. *United States,* 200 F.Supp. 944 (S.D.N.Y. 1961).

(e) the stay order of the District Court, because of the procedural time-table in other forums, threatens to deny petitioner of effective judicial review;

(f) petitioner's suit is the only action in any court which places in issue the validity of what would constitute the largest corporate amalgamation in U.S. history;

(g) the stay of the District Court prevents judicial consideration of the fundamental and far-reaching question of the meaning of the public interest criteria of Section 5(2) of the Interstate Commerce Act (49 U.S.C. Section 5(2)).

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. Section 1398, 28 U.S.C. 1651(a), 28 U.S.C. 2325 and 28 U.S.C. 1253, and are set forth herein in Appendix E.

STATEMENT

This petition for writ of mandamus or certiorari arises out of a conflict between railroad and non-railroad interests as to proper judicial review of two orders of the I.C.C. issued simultaneously on June 12, 1967. Certain railroads, particularly N&W, joined by the United States (U.S.) and I.C.C., have been successful in having the proposed PRR-NYC merger orders [1] litigated separately from the *N&W Inclusion* orders.[2] On the other hand, Moosic and other non-

[1] Pennsylvania R. Co.—Merger—New York Central R. Co., 330 I.C.C. 328.

[2] Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Merger, etc., 330 I.C.C. 780.

railroad plaintiff parties concerned with both I.C.C. orders issued simultaneously on June 12, 1967 have sought to have both I.C.C. orders litigated together simultaneously [3] in one consolidated proceeding.

Borough of Moosic was a party to the *N&W Inclusion* case before the I.C.C. That case involved the inclusion of E-L, D&H and B&M into N&W. Petitioner offered testimony and submitted exceptions. Moosic is served by E-L and D&H. It was not a party before the I.C.C. in the *PRR-NYC* case, initially reviewed by this court in *B. & O. R. Co.* v. *United States,* 386 U.S. 372 (1967).

Moosic became concerned with the proposed PRR-NYC merger only after the borough belatedly learned that the proposed merger was in part responsible for the petitions of E-L and D&H for inclusion in N&W. Moosic is a small municipality (pop. 5.500), is not served by PRR or NYC, and was not fully aware, at the time of its testimony in opposition to inclusion of E-L and D&H in N&W, that the proposed PRR-NYC merger was responsible for the proposed reduction or elimination of the competitive and independent status of E-L and D&H in the Moosic area.

The report of the Commission on remand in *PRR-NYC* was issued simultaneously on June 12, 1967 with *N&W Inclusion.* Borough of Moosic commenced its action against both I.C.C. orders by a single complaint filed June 26, 1967 in the United States District Court for the Middle District of Pennsylvania, the only court with venue provided by Congress where Moosic could

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[3] Consolidated judicial review was urged by the United States in its November 30, 1966 memorandum in *B. & O. R. Co.* v. *United States,* 386 U.S. 372 (1967).

bring its action.[4] It was joined by intervenors City of Scranton, City of Pottsville [5] and Milton J. Shapp on June 27, 1967. Hearing on petitioner's motion for an interlocutory injunction against both I.C.C. orders was set by the court for July 7, 1967.

However, the United States District Court for the Southern District of New York, upon the request of various railroads, on July 3, 1967 amended its April 28, 1967 order on mandate from the Supreme Court so as to enjoin the June 12, 1967 order of the I.C.C. in the *PRR-NYC* merger case. The July 3, 1967 memorandum order of the New York court is reproduced herein as Appendix F. On the morning of July 7, 1967, immediately prior to hearing on Moosic's motion for an interlocutory injunction, the I.C.C. voluntarily postponed the effective date of its order in the *N&W Inclusion* case. The actions of the New York Court and the I.C.C. thus mooted Moosic's application for an injunction.

After hearing on July 7, the United States District Court for the Middle District of Pennsylvania granted motions by defendant and intervening defendants [6] for a stay of further proceedings. The District Court's *per curiam* memorandum opinion, dated July 13, 1967,

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[4] 28 U.S.C. Section 1398, set forth in Appendix E herein.

[5] Pottsville's application for intervention was denied. See No. 433, *City of Pottsville* v. *United States*.

[6] Although PRR, NYC and the I.C.C. were the only intervening defendants at the July 7, 1967 hearing, special appearances and argument were made by E-L, D&H, N&W, City of Philadelphia and Commonwealth of Pennsylvania. Intervention was subsequently granted E-L and City of Philadelphia. Reading Company has filed its Southern District of New York papers with the Middle District of Pennsylvania court.

is set forth in Appendix B herein. The I.C.C. and U.S. represented to the Pennsylvania court in their joint memorandum in support of their motion for stay that the *PRR-NYC* and *N&W Inclusion* cases were "wholly interrelated", "completely intertwined" and "inextricably intertwined" and involved common issues, and urged that all litigation be conducted in New York.

Background of the New York Proceedings

Norfolk & Western Railway Company filed its suit to set aside the *N&W Inclusion* order June 13, 1967 in the United States District Court for the Western District of Virginia. On June 16, 1967 a meeting was held in New York City between counsel for the railroad parties, the I.C.C. and U.S., in chambers with the three judges who had heard the prior suit of *Erie-Lackawanna R. Co.* v. *United States,* 259 F. Supp. 964 (1966). This informal conference resulted in the issuance of two show cause orders for two motions. The first was the motion of N&W to amend the April 28, 1967 order of the New York court on mandate from the Supreme Court in *B. & O. R. Co.* v. *United States,* 386 U.S. 372, so as to embrace the June 12, 1967 order of the I.C.C. in the *PRR-NYC* case, 330 I.C.C. 328. The second motion was by PRR and NYC to require all parties to the earlier suit of September, 1966 to supplement their complaints or be dismissed with prejudice.

Replies to the Show Cause orders were submitted June 27, 1967 and a hearing was held June 28, 1967. The memorandum order of July 3, 1967 followed. This order contemplated that the *PRR-NYC* merger case would be heard in New York, and that the *N&W In-*

clusion case would be heard elsewhere. This memorandum order is set forth in Appendix F herein.

The First Stay Order

The U.S. and I.C.C. were participants to the June 16, 1967 conference in New York. Neither objected to having *PRR-NYC* heard in New York and *N&W Inclusion* heard in Virginia. Likewise, their respective pleadings in the New York court, submitted June 27, 1967, made no objection to splitting the two cases.

It was only after Moosic, on June 26, 1967, commenced its single action in one consolidated proceeding, that the U.S. and I.C.C. sought to bring all litigation to New York. The announcement of this intent was first made orally to the New York court at the June 28, 1967 hearing.

The U.S. and I.C.C. thereafter moved for a stay of all proceedings in the Pennsylvania and Virginia courts. The stay was granted in the Middle District of Pennsylvania by order entered July 11, 1967.[7]

The Second Stay Order

The Virginia court on July 14, 1967 ordered the parties to that action to file their briefs in *N&W Inclusion* in Virginia without prejudice to the New York *N&W Inclusion* action instituted by D&H.[8] In view

[7] The Virginia court on July 14, 1967 reserved the matter of a stay until September 26, 1967. (U.S.D.C.-W.D.Va., 67-C-51-R).

[8] Delaware & Hudson R. Co. v. United States (U.S.D.C.-S.D.N.Y., 67 Civ. 2451). D&H subsequently withdrew its brief. The earlier E-L "enforcement" action was apparently discontinued. Erie-Lackawanna R. Co. v. Norfolk & Western Ry. Co. (U.S.D.C.-S.D.N.Y. 67 Civ. 2362).

of the Virginia court's decision to proceed with a briefing and hearing schedule, petitioner on July 17, 1967 requested the Middle District of Pennsylvania to vacate its stay so as to likewise permit briefs in its consolidated action against the *PRR-NYC* and *N&W Inclusion* orders of the I.C.C.

On July 28, 1967, the Middle District of Pennsylvania denied petitioner's motion to vacate stay, mentioning the July 26, 1967 orders of the New York court, reproduced in Appendix G herein. It took notice that the New York court stated it would permit Moosic to intervene if Moosic desired to do so by August 2, 1967.

The Third Stay Order

The Pennsylvania court's original stay memorandum of July 13, 1967 provided that an application to modify the stay might be made after the August 8, 1967 briefs in *PRR-NYC* were submitted to the New York court. Accordingly, petitioner again sought to vacate the stay, but this was denied on August 30, 1967. This third order is set forth in Appendix D herein.

Petitioner thereupon concluded to petition the Supreme Court of the United States for a writ of mandamus or in the alternative for a writ of ceritorari under Section 1651 of Title 28 of the United States Code.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court heretofore has expressed the desire that judicial review of the Eastern railroad unification proceedings be handled expeditiously. *B. & O. R. Co.* v. *United States,* 386 U.S. at 392. The action of the United States District Court for the

Middle District of Pennsylvania in staying further proceedings in the consolidated action of petitioner against the *PRR-NYC* and *N&W Inclusion* orders appears to negate the opinion in *B. & O. R. Co., supra.*

2. Petitioner is unable to secure relief in any District Court. Section 1398 of the Judicial Code (28 U.S.C. 1398) provides that civil actions to set aside orders of the I.C.C. shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action. The gratuitous invitation extended Moosic by the New York court to intervene in New York affords petitioner no remedy since the New York court split a single cause of action into a *PRR-NYC* component and into a *N&W Inclusion* component, with separate pleading, briefing and argument schedules.

There is a fundamental substantive difference between judicial review of *PRR-NYC* and *N&W Inclusion* separately, on the one hand, and judicial review of *PRR-NYC* and *N&W Inclusion* considered together in one consolidated proceeding, on the other hand. The railroad parties, particularly N&W, have strongly and successfully urged that *PRR-NYC* and *N&W Inclusion* be treated as separate proceedings for judicial review purposes. This is the case-by-case treatment of railroad unifications. Petitioner, however, would be prejudiced by such procedure since the adverse impact of *N&W Inclusion* must be considered as an integral part of any judicial review of *PRR-NYC,* and vice versa. The attention of the court is directed to the final pleading filed by Moosic seeking to vacate the stay of proceedings, reproduced herein in Appendix H.

The New York court in its July 3 and July 26, 1967 memorandum orders stated that it will first consider *PRR-NYC* and determine the validity of that order without reference to *N&W Inclusion.* The latter matter only will be considered as bearing upon *PRR-NYC* with respect to the timing of the consummation of *PRR-NYC.* A central core of Moosic's case is that the adverse impact of the inclusion required by *PRR-NYC* must be considered in determining whether the I.C.C. correctly found *PRR-NYC* to be in the public interest, or whether the I.C.C. should have held further hearings or should have itself consolidated the two proceedings.

Since the I.C.C. reports in *PRR-NYC* and *N&W Inclusion* were both served on June 12, 1967, it would seem especially appropriate that both matters should be consolidated for judicial review, at least with respect to the public interest aspects. See also *B. & O. R. Co.,* v. *United States,* 386 U.S. 372.

3. The issues presented in the Southern District of New York and in Virginia are completely different from those raised by petitioner in the Middle District of Pennsylvania. No party in the New York action is attacking the basic validity of the PRR-NYC merger. All parties there believe the merger to be in the public interest. It is only in petitioner's suit that the basic challenge is made to the I.C.C.'s construction of the public interest under Section 5(2) of the Interstate Commerce Act. 49 U.S.C. 5(2). The issues raised by the plaintiffs to the New York action concern financial terms and conditions. There are virtually no issues in common between the parties in New York and the parties in the Middle District of Pennsylvania.

Accordingly, there is no duplication of work for the two courts, and a resolution of the issues pending in New York will not aid disposition of petitioner's action in the Middle District of Pennsylvania.

4. The stay of proceedings in the Middle District of Pennsylvania until October 1, 1967 or until further order of that court, gives petitioner no assurance the Pennsylvania court will, in fact, ever establish a briefing schedule for the joint consideration of the *PRR-NYC* and *N&W Inclusion* orders. In view of the dismissal of petitioner's three separate efforts to get the case moving, it seems likely that the District Court will continue its stay pending review of the Southern District of New York orders by the Supreme Court of the United States.

5. The procedural history of the case, as set forth herein, demonstrates that this is the type of case for which the extraordinary relief of 28 U.S.C. Section 1651 was designed. In the context of this case, the action of the District Court effectively deprives Moosic of a remedy without reaching the point where a final order or interlocutory order has been issued which would warrant conventional appellate review. The stay order of the District Court stayed proceedings until October 1, until after the Southern District of New York has heard and determined the *PRR-NYC* merger case. There is no assurance that the Middle District of Pennsylvania will establish a briefing schedule on October 1, particularly since it is unlikely that the New York or Virginia courts will have completed *N&W Inclusion* by that date, and the problem remains of appeal from the New York and Virginia courts to the Supreme Court.

6. It is an abuse of judicial discretion for the District Court to refuse to hear the community public interest issues inherent in this case, and which are clearly outside the scope of the litigation in the other forums. These issues go to the heart of the meaning of the public interest standards specified by Section 5(2)(c) of the Interstate Commerce Act. Cf. *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 444 (Douglas, J.). At the time of the District Court's last denial of petitioner's motion to vacate stay it was clear that petitioner's cause of action would not and, indeed, because of its very nature could not, be heard in any realistic sense in New York. (See Brief of Plaintiff and Intervening Plaintiffs to Vacate Stay, dated August 15, 1967, Appendix H herein).

7. The failure of the district court to proceed with petitioner's complaint, for all of the reasons enumerated above, constitutes an abuse of discretion within the meaning of the guidelines established in leading cases. *Landis* v. *North American Co.,* 299 U.S. 248 (1936); *Kansas City Southern Ry.* v. *United States,* 282 U.S. 760 (1931).

CONCLUSION

Petitioner prays that a writ of mandamus issue from this Court directed to the Honorable United States District Court for the Middle District of Pennsylvania, and to the Honorable Judges of said Court, requiring the Honorable Francis L. Van Dusen, Michael H. Sheridan and William J. Nealon to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing the said judges to hear and determine *Borough of Moosic, et al.* v. *United States, et al.,* No. 10054 Civil, pending in the

United States District court for the Middle District of Pennsylvania.

In the alternative, petitioner prays that a writ of certiorari issue to review the orders entered that stay further proceedings in *Borough of Moosic, et al.* v. *United States, et al.*, No. 10054 Civil, pending in the United States District Court for the Middle District of Pennsylvania.

Petitioner prays for such additional relief and process as may be necessary and appropriate in the premises.

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September 14, 1967

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BOROUGH OF MOOSIC, *Plaintiff*
MILTON J. SHAPP, ET AL., *Intervening Plaintiffs*

v.

UNITED STATES OF AMERICA, *Defendant*

and

INTERSTATE COMMERCE COMMISSION, ET AL.,
Intervening Defendants

Civil Action No. 10054

Order Sur Motions to Stay Further Proceedings

AND NOW, July 11, 1967, after consideration of the Motions of defendant and intervening defendants To Stay Further Proceedings, arguments presented on July 7, 1967, the Complaint of Intervening Plaintiffs Pennsylvania Communities filed in Erie-Lackawanna Railroad Company v. United States of America et al., Civil Action No. 66-2860 in the Southern District of New York, the Briefs and Memoranda filed by counsel, and the record, IT IS ORDERED that a stay of all proceedings is GRANTED until October 1, 1967, or further order of this court, with leave to any party or amicus curiae to apply for modification of such stay in the event that future circumstances justifying such modification develop.

FRANCIS L. VAN DUSEN, C. J.
MICHAEL H. SHERIDAN, J.
WILLIAM J. NEALON, J.

See Per Curiam Memorandum Sur Motion to Stay to be filed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 10054

BOROUGH OF MOOSIC, *Plaintiff*,
MILTON J. SHAPP and CITY OF SCRANTON, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, NEW YORK CENTRAL RAILROAD COMPANY, and PENNSYLVANIA RAILROAD COMPANY, *Intervening Defendants.*

Before: Van Dusen, Circuit Judge, and Sheridan and Nealon, District Judges

Memorandum Sur Motions of Defendant and Intervening Defendants for a Stay

PER CURIAM July 13, 1967

This action seeks to enjoin permanently, set aside and annul these June 9, 1967 (served June 12) Orders of the Interstate Commerce Commission under 28 U.S.C. § 1336:

A. Pennsylvania Railroad Company-New York Central Company Merger 21989-90 (hereinafter I. C. C. Penn-Central merger proceedings)—see Appendix 1 to Complaint.

B. Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Finance Docket

21510 et al. (hereinafter I. C. C. N & W-Nickel Plate merger proceeding)—see Appendix 2 to the Complaint.[1]

This case is now before the court on motions of defendant and intervening defendants for a stay of all proceedings. The background of the I. C. C. proceedings and court cases leading up to the application for a stay of proceedings is summarized in *Erie Lackawanna Railroad Co.* v. *United States,* 259 F. Supp. 964 (S. D. N. Y. 1966); *B. & O. R. Co.* v. *United States,* 386 U.S. 372 (1967); *Erie-Lackawanna Railroad Company* v. *United States of America et al.,* . . . F. Supp. . . . (S. D. N. Y. 66 Civ. 2860, 2903 & 2914, Memorandum Order of 7/3/67).[2] On the morning of July 7, 1967, the I. C. C. postponed the effective date of the inclusion order covering the Erie-Lackawanna Railroad Company (E-L), Delaware and Hudson Railroad Company (D & H), and the Boston and Maine Corporation (B & M) in the I. C. C. N & W-Nickel Plate merger proceeding pending its decision on petitions for reconsideration of the June inclusion order in the N & W-Nickel Plate merger proceedings by B & M and D & H.

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[1] An order of the I. C. C. permitting the Chesapeake & Ohio Railway Co. (C & O) to control the Baltimore and Ohio Railroad Company (B & O), which "owns 38% of the voting control of the Reading Company which in turn controls" Central Railroad of New Jersey (see 386 U. S. 372, at 383), was sustained in *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (E. D. Mich. 1963), aff'd. 375 U. S. 216 (1963). The C & O-B & O systems seek to merge with the N & W system into a single system, which has offered "to include" E-L, D & H, B & M, The Reading Company and CNJ "therein subject to various conditions" (see 386 U. S. 372 at 384).

[2] Related proceedings pending in the U. S. District Court for the Southern District of New York are Erie-Lackawanna Railroad Co. v. United States and Norfolk and Western Railway Co., No. 67 Civ. 2362, and Delaware and Hudson and Boston and Maine v. United States, No. 67 Civ. 2451.

These mergers have been considered by the I. C. C. as incident to what the Supreme Court of the United States has described as "the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States,* 356 U.S. 412, 417-8 (1958), which was quoted with approval in *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 387 (1967).

The Supreme Court of the United States has emphasized the need for expedition of all litigation challenging the Penn-Central merger, using this language in *B. & O. R. Co.* v. *United States,* supra, at 392:

> "The Penn-Central merger has been studied for a decade. Indeed, the parties to the merger agreed to it over five years ago and it has been under Commission consideration ever since that time. This is, of course, the more reason for expedition. We note and give weight to the estimates of the Commission that the inclusion proceedings of the three roads in the N & W should be concluded in 'a relatively short time.' Our remand should, therefore, entail only a very short delay before the Commission. If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made."

At the hearing on the above Motion on July 7, the United States and the Interstate Commerce Commission stipulated of record that as defendants in the above-mentioned civil actions pending in the United States District Court for the Southern District of New York, they would make no objection to, and would welcome, the intervention of plaintiff in this action as an intervening plaintiff there prior to the July 17 deadline established by that court in its July 3 Memorandum Order and that, in the interests of prompt dispatch of the important federal judicial litigation, which is involved in this case, plaintiff's complaint should be considered by the above-mentioned New York

Federal Court. Trial counsel for the City of Scranton and Mr. Shapp, who have been active intervenors in the New York Federal Court since the inception of 66 Civ. 2860, is also one of counsel for plaintiff. An examination of the complaint filed in this action (VIII A on pages 5-10) discloses that it is virtually identical with the complaint of such intervening plaintiffs in 66 Civ. 2860 insofar as such complaints attack the Penn-Central merger. Subsections y-bb (four subparagraphs) of this Complaint, which are not in the Complaint in 66 Civ. 2860, challenge inclusion of the New Haven Railroad in the merger and the failure to consider reported earnings of Penn-Central for the first three months of 1967. No reason has been shown why these matters cannot be raised in 66 Civ. 2860 before July 17.

Also, many of the issues covered by this complaint may be covered by the scheduled final hearing to be held before the New York Federal Court on September 18, 1967. In the Memorandum Order of July 3, 1967, this language appears:

> "The Supreme Court made it clear that the issues of 'the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties,' *ibid.*, remained for final determination in this actions ... If the actions remain pending for the grant of relief which the N & W and its allies want, especially for what, as will hereafter appear, we consider relief that may go beyond the Supreme Court's mandate, they are pending for other purposes as well.
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> "Each plaintiff or intervening plaintiff in such actions shall file and serve on or before July 17, 1967 a supplemental complaint setting forth in what respects it objects to the order in F.D. No. 21989 as this now stands and *what further relief it seeks.* [Emphasis supplied.]

It is not clear exactly how many issues challenged by the attack made in VIII B and C (pages 10-12 of this complaint will be considered at the New York Federal Court's final hearing on September 18. However, the above-quoted language from the July 3 Memorandum Order makes it likely that most, if not all, of them will be so considered if they are raised in supplemental complaints or an intervening complaint filed by the plaintiff on or before July 17.[3] An application to modify the stay of proceedings in this case may be made, if appropriate, after August 8, when the supplemental complaints and briefs of the moving parties have been filed in the New York Federal Court cases. Also, it is noted that the basic attack in this complaint is on the Penn-Central merger and plaintiff contends the railroads in its Borough (E-L and D & H) were forced to apply to participate in the N & W merger by the Penn-Central merger proposal.

The venue language of 28 U.S.C. § 1398 does not preclude the granting of a stay in a proceeding to enjoin an order

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[3] In footnote 9 on page 949 of *New York Central Railroad Company* v. *United States*, 200 F. Supp. 944 (S. D. N. Y. 1961), it is noted that Professor Moore believes that an intervenor's complaint may expand the issues presented by the original plaintiff, even though that court reached a different conclusion on the facts of that case. It may be that avoidance of a multiplicity of suits concerning these two larger mergers will justify requiring a party such as this plaintiff to intervene both in the New York Federal Court as well as in the Virginia Federal Court (Norfolk and Western Ry. Co. v. United States, C. A. 67-C-51-R in W. D. of Va.—Roanoke Div.), since the actions in both those courts, which are more convenient to the litigants who produced most of the documents and records in the administrative proceedings being attacked, were instituted prior to this action. If parties such as plaintiff are required to litigate their challenges to administrative orders affecting large numbers of persons over large areas in one or two centrally located courts, it would seem likely that Professor Moore's rule would be applied at least in such cases. In any event, it may well be necessary to limit this action to matters which are not permitted to be raised in the New York Federal Court.

of the I.C.C. in view of this language of the Supreme Court of the *United States in Kansas City Southern Ry.* v *United States,* 282 U.S. 760, 763-4 (1931):

> "The question is thus one for the sound discretion of the District Court, in which such a suit is brought to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, *to the end that there may not be a multiplicity of suits without substantial reason.* . . . [Emphasis added.]

Both the Supreme Court of the United States and the United States Court of Appeals for the Third Circuit have stated that the rule that "the court which first has possession of the subject must decide it" is "salutary." See *Smith* v. *McIver,* 22 U.S. 532, 535 (1824); *Crosley Corporation* v. *Hazeltine Corporation,* 122 F.2d 925, 929-930 (3rd Cir. 1941). In the latter case, Judge Maris used this language at page 930:

> "It is of obvious importance to all litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. . . . The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

Cf. *Popkins* v. *Eastern Airlines, Inc.*, 204 F. Supp. 426, 432-3 (E. D. Pa. 1962). See, also, authorities cited at pages 16-18 of defendant's Memorandum attached to its Motion To Stay Further Proceedings. In footnote 3 of the Memorandum Order of July 3, 1967, the New York Federal Court pointed out:

> "3. Once we entertained E-L's suit to enjoin the merger actions in other districts, seeking the same relief might well have been stayed by those courts on the United States' stipulating not to contest venue here. See Kansas City Southern Ry. v. United States, 282 U.S. 760, 763-64 (1931); New York Central R. R. v. United States, 200 F. Supp. 944, 950-51 (S.D.N.Y. 1961)."

For the foregoing reasons, a stay of all proceedings will be granted at this time until October 1, 1967 (approximately two weeks after the September 18 final hearing date) or further order of this court, with leave granted to any party or amicus curiae to apply for modification of such stay if future circumstances justify such application.

It is not necessary to rule at this time on defendant's suggestion that the stay provide that plaintiff's and intervenor-plaintiffs' complaints will be dismissed with prejudice if they do not seek to intervene or file supplemental complaints in the above New York Federal Court litigation.

Plaintiff and defendant are requested to give the court a report on the status of other litigation concerning the I. C. C. orders attacked in this case and of all court litigation concerning them no later than September 5, 1967.

In view of the terms of 28 U.S.C. §2323 and the statements in the record showing that the following are parties to the relevant I. C. C. proceedings, they have been permitted to intervene in this proceeding:

Milton J. Shapp, as a party plaintiff
City of Scranton, as a party plaintiff

New York Central Railroad Company, as a party defendant

Pennsylvania Railroad Company, as a party defendant

Interstate Commerce Commission, as a party defendant

However, all parties must recognize that the above-mentioned litigation was commenced in the New York and Virginia (footnote 3) Federal Courts before the institution of this suit and their rights may be affected if they do not seek to intervene promptly in one or both of those proceedings. Also, additional consequences may be applicable to Mr. Shapp and the City of Scranton if they fail to press their claims in the New York Federal Court since they have been parties to that proceeding for almost a year.

Since the City of Pottsville is not located in this District (28 U.S.C. §1398) and the defendant has objected to parties raising their objections to these I.C.C. Orders other than in the Southern District of New York, its application to intervene must be denied.

The application of the City of Philadelphia cannot be granted until it files and serves a copy of its proposed Answer to be attached to its Motion. See F. R. Civ. P. 24(c).

FRANCIS L. VAN DUSEN, C. J.
MICHAEL H. SHERIDAN, J.
WILLIAM J. NEALON

July 13, 1967

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Filed July 28, 1967)

Civil Action No. 10054

BOROUGH OF MOOSIC, *Plaintiff*,

and

MILTON J. SHAPP and CITY OF SCRANTON,
Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, NEW YORK CENTRAL RAILROAD COMPANY, AND PENNSYLVANIA RAILROAD COMPANY, *Intervening Defendants*.

Order Sur Motion to Vacate Stay, Etc.

(Document 40)

AND NOW, July 27, 1967, after consideration of the above Motion To Vacate Stay (Document 40), the Reply of the United States of America and the Interstate Commerce Commission to such Motion (Document 45), the Objections of the Pennsylvania Railroad, et al. (Document 46), the Memorandum in Support of Such Motion with Appendices, the Memorandum in Reply to the Motion of the Delaware & Hudson Railroad Corporation (Document 48), the Orders of the U.S. District Court for the Southern District of New York entered July 26, 1967, in 66 Civ. 2860, 2903 and 2914, granting plaintiff and Pottsville the right to intervene and file complaints in those proceedings on or before August 2 the right to fill supplemental complaints by August

2 also being given to intervening plaintiffs) and in 67 Civ. 2451, joining the Norfolk & Western Railway Company as a party plaintiff and establishing a briefing schedule, and the record, It Is Ordered that the Motion to Vacate Stay of Further Proceedings and for an Order Setting a Schedule of Briefing Dates (Document 40) is Denied, except insofar as all parties to this action are directed to file with this court copies of all Pleadings, Motions, Memoranda and Briefs which they file in any of the pending actions in the United States District Courts for the Southern District of New York and the Western District of Virginia, mentioned on page 2 and in footnote 3 of the Memorandum filed in this case on July 13, 1967;

It Is Further Ordered that any party or amicus curiae has leave to apply for modification of the stay entered July 11, 1967, in the event that future circumstances justifying such modification develop.

FRANCIS L. VAN DUSEN, C. J.
MICHAEL H. SHERIDAN, D. J.
WILLIAM J. NEALON, D. J.

APPENDIX D

Order Sur Motion to Vacate Stay of Proceedings And to Establish A Briefing Schedule

And Now, August 30, 1967, after consideration of the Motion to Vacate Stay of Proceedings and To Establish A Briefing Schedule (Document 57), the Reply of the United States of America and the Interstate Commerce Commission to that Motion, being Document 64, Memorandum of the Pennsylvania Railroad Company and the New York Central Railroad Company In Opposition to Motion to Vacate Stay of Proceedings and To Establish A Briefing Schedule, being Document 65, the Memorandum in Support of the Order to Show Cause (Document 56), the injunction of July 3, 1966 (S.D.N.Y. 66 Civ. #2860, 2903 & 2914) providing that the orders in Finance Docket No. 21989-90 shall not be effective until September 1967, and the record, including the Second Supplemental Complaint of Reading Company (particularly paragraphs XIX et seq.) filed in 66 Civ. 2914 in July and in this court on August 14, brief of Reading Company filed in 66 Civ. 2860, 66 Civ. 2903 and 66 Civ. 2914 dated August 8, 1967, and filed in this court on August 14, 1967, It Is Ordered that the Motion To Vacate Stay of Proceedings and To Establish a Briefing Schedule (Document 57) is Denied.

Francis L. Van Dusen, C. J.
Michael H. Sheridan, J.
William J. Nealon, J.

APPENDIX E

Judiciary Act. Title 28, United States Code:

Section 1398.

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 1253

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Section 1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 2325

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the applicant therefor is heard and determined by a district court of three judges under section 2284 of this title.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

THE DELAWARE & HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON and BOROUGH OF FREEDOM, and BOSTON & MAINE R.R. Co., Intervening Plaintiffs,

PENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor, Intervening Defendants.

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant,
WESTERN MARYLAND RAILWAY COMPANY,
Intervening Plaintiff.

Motions heard June 28, 1967 before FRIENDLY, C.J. and WEINFELD and LEVET D.JJ.

Cravath, Swaine & Moore, by Thomas D. Barr, and Alexander & Green, for plaintiff Erie-Lackawanna R.R.

Nixon, Mudge, Rose, Guthrie, Alexander & Mitchell, by Harry G. Silleck, Jr., for plaintiff Delaware & Hudson R.R.

Arthur Arsham, by Gordon P. McDougall, for intervening plaintiffs Milton J. Shapp, City of Scranton and Borough of Freedom.

Gerald E. Dwyer for intervening defendants New York Central R.R. and Conboy, Hewitt, O'Brien and Boardman for intervening defendant Pennsylvania R.R., by James B. Gray.

Howard E. Shapiro for defendant United States of America.

Robert W. Ginnane for defendant Interstate Commerce Commission.

Robert W. Peet and Sullivan & Worcester, by Joseph Auerbach, for Trustees of New York, New Haven & Hartford R.R.

Kelley, Drye, Newhall, Maginnes & Warren; Sidley & Austin by Howard J. Trienens; Wilmer, Cutler & Pickering; and Wheeler & Wheeler, for plaintiffs Norfolk & Western Ry., Baltimore & Ohio R.R., and Chesapeake & Ohio Ry. and intervening plaintiff Western Maryland Ry.

Richard J. Lally and Martin J. Flynn for Trustees of the Central Railroad Company of New Jersey, plaintiff.

Macklin, Hanan & McKennan, by William P. Quinn, for plaintiff The Reading Company.

Walter J. Myskowski, for State of New York, intervening defendant.

William J. Lynch, for State of Connecticut, intervening defendant.

Memorandum Order

By a supplemental report and order on reconsideration and further hearing in F.D. No. 21989, Pennsylvania Railroad Company — Merger — New York Central Railroad Company, 330 I.C.C. 328, served June 12, 1967, the Interstate Commerce Commission authorized consummation of the merger of the Pennsylvania Railroad Company (PRR) and the New York Central Railroad Company (NYC) on the effective date of the order, to wit, July 17, 1967; the order provided that if the authority therein conferred was not exercised within 180 days thereafter, it should be of no further force or effect. At the same time the Commission issued a further report and order in F.D. No. 21510, Norfolk & Western Ry. Co. and New York, Chicago & St. Louis Railroad Company—Merger, etc., directing inclusion of the Erie-Lackawanna (E-L), the Delaware & Hudson (D & H) and the Boston & Maine (B & M) in the Norfolk & Western (N & W). These rulings have precipitated a number of motions in these actions, have given birth to several new actions, and threaten to spawn still more. N & W has brought suit in the Western District of Virginia to enjoin enforcement of the inclusion order. E-L has brought an action in this court to enforce that order, which N & W has moved to dismiss; we are advised the ICC has moved in the Western District of Virginia for a stay of N & W's action in that court. The D & H and B & M, both of which have petitioned the I.C.C. for reconsideration of the terms of the inclusion order, have also sued in this court; they support the direction for their inclusion in the N & W but challenge the financial terms. The Borough of Moosic has brought an action in the Middle District of Pennsylvania to enjoin the orders both in the merger case and in the inclusion case; we are advised that the City of Pottsville has joined in that action and that Milton J. Shapp and the City of Scranton, intervening plaintiffs in these actions, have also intervened as plaintiffs therein. The Trustees of the Central Railroad of

New Jersey (CNJ), a plaintiff in one of the actions in this court, have informed us of their intention to urge the CNJ's objections to the PRR-NYC merger not in this court but in the District of New Jersey. The Reading Company, also a plaintiff here, intends to pursue a similar course either in the Eastern District of Pennsylvania or by intervention in some other suit, presumably the CNJ's. The B & O, C & O, N & W, and Western Maryland, plaintiffs or intervening plaintiffs here, also assert and presumably intend to pursue supposed rights to attack the merger order by new actions in what they term "a court of appropriate statutory venue," to wit, the district courts for Maryland, Northern Ohio, and Western Virginia. Such a proliferation of actions in many different courts is a far cry from the expedited and early determination of review proceedings to which a majority of the Supreme Court referred in reversing our denial of a temporary injunction, Baltimore & Ohio R.R. v. United States, 386 U.S. 372, 392 (1967); indeed, considered in the aggregate, it outruns even the fears of the four dissenters as to what may be done by "ingenious counsel bent on delay." 386 U.S. at 472.

I.

In an effort to introduce a modicum of order into so much of this chaos as relates to the Commission's supplemental order in the merger case, PRR and NYC have moved that we require each plaintiff or intervening plaintiff in the instant actions to file supplemental complaints setting forth the claims now made in the light of the Commission's supplemental report on reconsideration, direct that the complaint of any such party not so amending its complaint be dismissed with prejudice, and set a schedule for responsive pleadings, briefs and final hearing. There are several kinds of unfinished business in these actions. One concerns objections to the Appendix G protective conditions, now revised, whether on the ground of inadequacy from the standpoint of the three protected roads or on

the ground, previously urged by B & O, C & O, N & W, CNJ, the Reading, the Western Maryland, and C. & E.I., "that these provisions created a 'community of interest' between the protected roads" and the merged company which would produce additional diversion, see 259 F. Supp. at 970, 976; we have been told by counsel for the N & W and other plaintiffs that they regard the revised conditions as even worse in this respect. These railroads and possibly others apparently intend to argue also that the Commission's prescription of any protective conditions was inconsistent with a passage in the Supreme Court's opinion, 386 U.S. at 390. In addition certain special objections raised by C. & E.I., the Western Maryland, CNJ and the Reading are as applicable to the supplemental order on reconsideration as to those of 1966. Broadest of all is the objection of intervening plaintiffs Milton J. Shapp, the City of Scranton and the Borough of Freedom,[1] which assails the validity of the merger on a wide front. Inherent to all these is the question, raised by another motion discussed below, of extending the injunction against consummation until these issues have been decided.

The N&W, B&O, C&O, Western Maryland, the Trustees of the C.N.J., the Reading,[2] Shapp and the City of Scranton oppose the motion made by the Pennsylvania and the Central; the United States, the Interstate Commerce Commission, and the states of New York and Connecticut support it. The basic claim of the railroads opposing the motion is that the actions in this court have ended and that anyone seeking to attack the supplemental report and order on reconsideration may and indeed must do so in a new action in "a court of appropriate statutory venue"; the N&W and the railroads allied with it contend also that if the inclusion order is ultimately sustained and if the stockholders of the protected roads immediately accept, the pro-

[1] We are advised that the Borough of Freedom does not intend to participate further.

[2] The Reading has moved to "quash" the motion; we deny this.

tective conditions may never take effect and hence are not now ripe for review. Shapp and the City of Scranton also contend that the actions here have come to an end; they prefer to conduct their further attack on the merger by intervening in the suit just brought by the Borough of Moosic in the Middle District of Pennsylvania against both the merger order and the inclusion order rather than "in a distant and foreign forum..."

The parties opposing the motion are wrong in saying these actions have terminated. The subject of the complaints of the plaintiffs and intervening plaintiffs was the Commission's approval of the merger, as it then stood or as it might stand in the future. All that we had before us for decision last fall and the Supreme Court had before it on appeal, see 386 U.S. at 378, were motions for interlocutory relief, to wit, temporary injunctions of the merger pending the reconsideration the Commission had already granted; the actions could not proceed to final hearing until that had been completed. The Supreme Court made it clear that the issues of "the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties," *ibid.*, remained for final determination in these actions after the Commission had made its supplemental order on reconsideration. Compare Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188, 203 (1939); New York Central R.R. v. United States, 207 F. Supp. 483, 498 (S.D.N.Y. 1962). Indeed, the position taken by N&W and the roads associated with it in opposition to the motions of PRR and NYC contrasts rather strangely with their own request for further injunctive relief in the actions brought by them in this court. If the actions remain pending for the grant of relief which the N&W and its allies want, especially for what, as will hereafter appear, we consider relief that may go beyond the Supreme Court's mandate, they are pending for other purposes as well.

The idea that litigants challenging an order of a federal administrative agency may invoke the jurisdiction of one federal court, require it to expend its energies in becoming familiar with the subject-matter, obtain interlocutory relief against enforcement of the order, and then take their grievances to another federal court which they consider may be more favorable while their complaints remain pending for final disposition, does not commend itself in general; and surely this case, where expedition is so important, would be the last one in which to countenance proceedings of that sort. In re Georgia Power Co., 89 F.2d 218 (5 Cir.), cert. denied, 392 U.S. 692 (1937), sustaining a refusal to allow dismissal without prejudice and an injunction against a second suit, strongly supports our view. Whatever rights many of these plaintiffs initially had to sue elsewhere,[2] they brought their actions to enjoin the merger here, and any objections on the score of venue have long since been waived. The plaintiffs and intervening plaintiffs would have been surprised and rightly aggrieved if, in the event of their desiring to prosecute these actions in this court after the ICC's supplemental report on reconsideration, the United States had insisted that new process issue so that a venue objection could have been taken. Their reliance on New York Central R.R. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961), is wholly misplaced. The issue raised by the parties in that case was whether an action brought here should be transferred to the district court for Maryland under 28 U.S.C. §1404(a), and we held it could not be. Our remarks as to refusal of a stay of the action in this court must be read in the light of the facts

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[2] Once we entertained E-L's suit to enjoin the merger, actions in other districts seeking the same relief might well have been stayed by those courts on the United States' stipulating not to contest value here. See Kansas City Southern Ry. v. United States, 282 U.S. 760, 763-64 (1931); New York Central R.R. v. United States, 200 F. Supp. 944, 950-51 (S.D.N.Y. 1961).

that the New York interests had never invoked the jurisdiction of the District Court for Maryland, since they supported rather than opposed the orders the I.C.C. had initially issued, see 200 F. Supp. at 495; that the Maryland district court had taken final action, Baltimore & Ohio R.R. v. United States, 151 F. Supp. 258 (D. Md.), vacated 355 U.S. 175 (1957), and not merely granted interlocutory relief as has been done here; and, as this court noted, that the Maryland interests recognized this by bringing "an entirely new action" after the Commission's further order, see 200 F. Supp. 946 n.3. While obviously no plaintiff should be forced to litigate against his will, that does not mean that he is wholly free at his own volition to stop litigation in the court of his initial choice and begin again in another, regardless of the interests of other parties and the public interest. See F.R. Civ. P. 41(a)(2). Cf. Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14 (S.D.N.Y. 1953).

As to the argument concerning ripeness, while it is theoretically possible that the protective conditions may never need to be invoked, realism suggests the contrary. If the inclusion order is temporarily enjoined as N&W is asking in its suit in the Western District of Virginia, some time would necessarily elapse between that order becoming final and effectuation of the inclusion of each of the three roads. Stockholder assent can hardly be obtained until the terms become certain. And further problems might arise if inclusion of D&H and B&M were prevented by lack of stockholder approval on the part of E-L or, in the case of B&M, of either E-L or D&H. See Appendix F to Supplemental Report in F.D. No. 21510, General Terms and Conditions 1 and 2. Furthermore, as will hereafter appear, we are reserving the question how far, if we find the supplemental report and order in F.D. 21989 to be valid, we will extend the injunction during review of the inclusion order. In any event the Supreme Court's decision requires

that the parties and we should make whatever sacrifice there may be in what might turn out to have been an unnecessary task of reviewing the revised Appendix G conditions, and, as indicated, other questions remain unresolved.

We therefore set the three actions seeking to enjoin the orders in F.D. 21989 and 21990, to wit, 66 Civ. 2860, 2903 and 2914, including the complaints of intervenors, for final hearing on September 18, 1967, see F.R. Civ. P.65(a)(2). Each plaintiff or intervening plaintiff in such actions shall file and serve on or before July 17, 1967, a supplemental complaint setting forth in what respects it objects to the order in F.D. No. 21989 as this now stands and what further relief it seeks. In the absence of good cause shown at the said hearing we intend to dismiss with prejudice the complaint of any plaintiff or intervening plaintiff which has not filed such a supplemental complaint. Responsive pleadings shall be filed and served on or before July 27. Briefs of plaintiffs and intervening plaintiffs shall be filed and served by August 8, answering briefs by August 29, and reply briefs by September 12, 1967.

II

N&W, B&O, C&O, and Western Maryland have moved that the order entered in these actions on remand from the Supreme Court on April 28, 1967, should be modified by expanding the reference in paragraph 3 to the merger of PRR and NYC authorized by the ICC's orders in F.D. 21989, dated April 6 and September 19, 1966, so as to include the supplemental order on reconsideration served June 12, 1967. This motion must be considered in the context of the language in the same paragraph that the injunction should continue "pending the completion of the proceedings directed by the Supreme Court." The movants contend that such proceedings include not only proceedings for the judicial review of the order on reconsideration in the merger case, F.D. 21989, which we have discussed above,

but also the order of the same date in the N&W inclusion proceeding, F.D. No. 21510.

Three different positions as to our duty under the Supreme Court's mandate emerge from the briefs and argument. The movants' position, supported in considerable degree by the United States, is that the injunction must remain in effect until every phase of the orders in both dockets has been finally passed upon by the Supreme Court.[4] At the other end of the spectrum the Interstate Commerce Commission, the State of New York, PRR and NYC, and the Trustees of the New Haven (NH) contend that the Court's only *mandate* was to enjoin consummation until the *Commission* had finished its work in the two cases which the Court outlined, although they acknowledge our power to grant further relief on a proper showing and on conditions designed to insure the greatest possible expedition.[5] E-L and D&H seem to suggest a midway position, that although the Court expected an injunction during further judicial review of both orders, this was dependent on the achievement of expedition.

All these positions find some support in the majority opinion of the Court. The I.C.C. and others joining with it emphasize the Court's narrow statement of its holding, "We hold only that under the uncontradicted findings of the Commission it was necessary for it to conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger," and its equally narrow definition of the "sole question before it," 386 U.S.

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[4] Counsel for the United States reserved judgment on whether the injunction would have to continue during litigation only on the *terms* of inclusion; he thought "there might be some lattitude" on that score.

[5] It may be that the Trustees of NH do not join in the acknowledgment.

at 378; another statement which we quote in the margin;[6] and the concluding direction,

> "The judgment of the District Court is reversed and the cause is remanded with instructions that it be remanded to the Commission for further proceedings not inconsistent with this opinion." 386 U.S. at 392.

The parties favoring a broader injunction point in contrast to another passage which we quote in the margin[7] and, more particularly, to the third sentence.[8] Some of the opponents respond with the Court's remark that the N&W had "indicated its acquiescence" to inclusion of the three

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[6] "In view of the patent invalidity of the order permitting immediate consummation of the merger and in light of the present status of the litigation before the Commission, we can only conclude that it is necessary that the decision as to the future of the protected railroads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger. This is especially true since the findings and recommendation of Commissioner Webb, as to the inclusion of the three protected railroads, are now under submission to the full Commission and a decision should be reached thereon by July or August 1967, we are advised by counsel. This short time would have little effect upon the ultimate consummation of the merger—which has been in the making for some 10 years now—and if it resulted in the future of the protected railroads being finally decided, serious losses to them would be obviated." 386 U.S. at 390.

[7] " . . . We note and give weight to the estimates of the Commission that the inclusion proceedings of the three roads in the N&W should be concluded in a 'relatively short time.' Our remand should therefore, entail only a very short delay before the Commission. If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties. After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation." 386 U.S. at 392.

[8] They also stress the language in the passage quoted in fn. 6 as to "the future of the protected railroads being finally decided."

roads, 386 U.S. at 383, and argue that whatever the Court may have said about review of an inclusion order was predicated on the assumption that N&W would not challenge the basic validity of such an order (as distinguished from the financial terms) as it has now done. N&W denies this; it says it only indicated acquiescence in an inclusion order upheld on judicial review, see 324 I.C.C. at 28, 148.

We find it unnecessary to decide among these contentions at the present time. Enough has already transpired to suggest that, even with a far greater degree of cooperation in carrying out the Supreme Court's instructions than has thus far been manifested, finalization of the inclusion order may prove a much longer and more complicated task than the majority anticipated. In addition to N&W's basic attack on the order, none of the four affected carriers except E-L is satisfied with the financial terms. There is also the possibility, already mentioned, that once these are finally set, rejection by E-L's stockholders would prevent inclusion of D&H and B&M, and rejection by D&H's would prevent the B&M's inclusion; a carrier suffering non-inclusion in N&W as a result of rejection by the stockholders of another would then be entitled to seek inclusion in the PRR-NYC system, with more hearings before the Commission and further judicial review. All this could take years. We do not read the Supreme Court's opinion as directing us here and now to issue an injunction for so long a period, which might have such serious consequences not only to the PRR and NYC and the public served by them but also to NH and the four states heavily dependent upon its service.

On the other hand we do not believe it would be proper to permit consummation of the merger without our hearing and determining objections to the supplemental order in the merger case, F.D. 21989, itself. Enjoining consummation until that time will truly involve a relatively short delay; indeed, if petitions for reconsideration filed in the inclusion case, F.D. 21510, should lead the Commission to postpone the effective date of the order in the merger case,

as to which we make no suggestion, there might be none at all. By the time we decide these actions in the early fall many things may be clearer than they now are. If we should determine that the revised protective conditions are satisfactory or require only minor modification and that the order is valid in all other respects, we would have seriously to consider whether the injunction should continue and, if so, how long, to what extent, and on what terms. In this connection attention would have to be given to the Court's observation "that should the immediate consummation of the merger be permitted and at a later date *neither* the interim conditions *nor* the inclusion proceedings be disposed of favorably to the continued existence of the merger, the only remedy remaining would be to set it aside and unscramble the consolidation." 386 U.S. at 391. (Emphasis supplied). This could well mean that once the propriety of the protective conditions was established, the merger might be allowed to be consummated and perhaps should be if the balance of interests suggested. On the other hand, if we should find the revised protective conditions invalid or the order unsound in other important particulars, a further injunction would doubtless be required.

We therefore modify paragraph 3 of our order of April 28, 1967, to read:

> "3. The orders of the Interstate Commerce Commission entered on April 6 and September 19, 1966, and served June 12, 1967, insofar as they authorize immediate consummation of the merger between the Pennsylvania Railroad Company and the New York Central Railroad Company are enjoined pending the final determination of these actions by this Court and thereafter for such further time, if any, and to such extent and on such terms as this Court may then direct. The period of 180 days fixed by the Commission in its order served June 12, 1967 for exercising the authority there conferred shall not begin to run so long as such injunction remains in effect."

In order to expedite determination whether a further injunction should be issued in our decision in the fall, all parties seeking such relief shall file and serve applications supported by appropriate affidavits and briefs not later than September 5, 1967, opposing affidavits and briefs shall be filed and served not later than September 14. We shall expect such affidavits to inform us as to the then status and future time-table of proceedings for review of the inclusion order (including the possibility of separate and expedited determination of the validity of the direction for inclusion, as distinguished from the terms); the grounds asserted for invalidating that order in whole or in part and the answers thereto; the views of the three protected roads and the United States whether and why a further injunction is needed;[9] the representations made to the Supreme Court as to judicial review of an inclusion order and of N&W's acquiescence in such an order; the then status of proceedings for the inclusion of NH in the PRR-NYC system and of the reorganization of NH under § 77 of the Bankruptcy Act; and any other relevant facts. We shall set a time for argument on such applications at the hearing heretofore directed.

The Clerk shall enter this as an order.

/s/ Henry J. Friendly
U.S.C.J.

/s/ Edward Weinfeld
U.S.D.J.

/s/ Richard H. Levet
U.S.D.J.

3 July, 1967.

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[9] We emphasize this since no injunction of the merger pending review of the inclusion order would seem to be justified in the interest of the N&W, and still less in that of the B&O, C&O or Western Maryland, which have joined in its motion; the interests that would justify a further injunction would be those of E-L, D&H and B&M and the communities they serve.

APPENDIX G

Memorandum on Motions of Trustees of Central Railroad of New Jersey, Boston & Maine Corporation, and City of Scranton and Milton J. Shapp.

I. The Trustees of the Central Railroad of New Jersey (CNJ) having represented in their motion "that they will not assert in any Court any claim that the Penn-Central merger should be delayed for any reason" and having stipulated in open court that, while reserving the right to assert that the order of the Interstate Commerce Commission should contain protective conditions for the benefit of CNJ they will not ask that the Appendix G conditions in favor of other carriers be set aside, their motions to be relieved from the requirements of our Memorandum Order of July 3, 1967, insofar as that order requires them to file any amended complaint on or before July 17, 1967, to file a brief by August 8, 1967, to file reply briefs by September 12, 1967, and to bring the action as to them to final hearing on September 18, 1967, is granted.

II. Boston and Maine Corporation having represented to this Court that its "primary interest is that the Penn-Central merger actually occur and not be so long delayed that it fails of consummation," its motion to withdraw its complaint as an intervening plaintiff and to be realigned as an intervening defendant is granted.

III. The motion of the City of Scranton and Milton J. Shapp, intervening plaintiffs, for a stay of further proceedings or in the alternative to permit dismissal of their complaint without prejudice is denied, for reasons indicated in our Memorandum Order of July 3, 1967. The movants have shown no sufficient cause why, having invoked the jurisdiction of this Court where this litigation has been centered, they should now be allowed to present the self-same issues to another district court which has thus far had no occasion to occupy itself with their problems. Taking note of the Memorandum sur Motions of Defendant and Interven-

ing Defendants for a Stay issued by the District Court for the Middle District of Pennsylvania in Borough of Moosic et al. v. United States of America et al., Civ. No. 10054, on July 13, 1967, this Court will grant the Borough of Moosic and the City of Pottsville leave to intervene in these actions as plaintiffs if application accompanied by a complaint is made on or before August 2, 1967. The time of the City of Scranton and Shapp to file a supplemental complaint is similarly extended. In the event of such intervention or the filing of such a supplemental complaint pleadings responsive thereto shall be filed on or before August 12, 1967. The schedules set forth in our Memorandum Order of July 3, 1967, shall be complied with in all other respects. The hearing scheduled for September 18, 1967, will begin at 9:30 A.M. at a courtroom to be assigned.

In accordance with the suggestion made by counsel for the Interstate Commerce Commission, we place the various plaintiffs and intervening plaintiffs on notice that they are responsible for seeing to it that the court is furnished with the portions of the record they deem relevant to the issues they desire to raise. We shall expect the Commission to cooperate fully in this regard.

HENRY J. FRIENDLY
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

RICHARD H. LEVET
U.S.D.J.

26 July, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants.*

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant.*

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant.*

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66 Civ. 2451

THE DELAWARE AND HUDSON RAILROAD CORPORATION, *Plaintiff.*

v.

UNITED STATES OF AMERICA, *Defendant.*

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*

Memorandum on Motion for Injunction.

The United States of America and the Interstate Commerce Commission have moved this Court to enjoin

(1) the Norfolk and Western Railway Company from taking any further action in Civil Action No. 67-C-51-R, *Norfolk and Western Ry.* v. *United States,* before the United States District Court for the Western District of Virginia; and

(2) the City of Scranton and Milton J. Shapp from taking any further action in Civil Action No. 10054, *Borough of Moosic et al. v. United States,* before the United States District Court for the Middle District of Pennsylvania,

pending final determination of the instant actions by this Court.

For reasons indicated in our Memorandum Order of July 3, 1967, and in our order of today's date denying the motion of the City of Scranton and Shapp for a stay of 66 Civ. 2860 or for leave to dismiss their intervening complaint in that action without prejudice and on the basis of the authorities cited in the Memorandum in Support of the Motion, we entertain no doubt of the power and propriety of granting the relief sought by the United States and the Commission against them insofar as this relates to issues that can be litigated in the action in this court in which they have intervened, and we would do this if there were any evidence of need. However, the District Court for the Middle District of Pennsylvania has stayed proceedings in that court in Civ. No. 10054 until October 1, 1967, or further order of the court, and before that time we shall either have heard these parties in 66 Civ. 2860 or, if they should choose not to prosecute their intervening complaint, will have dismissed it with prejudice.

The portion of the motion asking us to enjoin the City of Scranton and Shapp from prosecuting so much of Civ. No. 10054 in the Middle District of Pennsylvania as relates to the inclusion order, and the N&W from prosecuting Civ. No. 67-C-51-R in the Western District of Virginia raises a closer question. While we have no desire to assume additional burdens, we must agree with the United States and the Commission, as the District Court for the Western District of Virginia also appears to do, that the "inclusion" case is sufficiently interrelated with the "merger" case that the public interest would be best served by their being handled by a single court of first instance, which is able to entertain both.[1] We agree also that the few days priority in time of the N&W's action in the Western District of Virginia with respect to the inclusion order over the D&H's

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[1] This is sufficiently evidenced by the N&W's motion that we enjoin the merger pending final determination of both the merger action and the inclusion action. In our Memorandum Order of July 3, 1967, we indicated that if we found the merger order valid our determination whether or not to enjoin the merger pending final determination of the inclusion proceeding might well depend on the nature and substantiality of the objections to the inclusion order—a problem in which the aggravated plight of the New Haven, see Judge Anderson's memorandum of July 11, 1967, may be of great importance. If we are seized of the inclusion action, we shall not have the embarrassment of being obliged to predict the views of another court. Also, as made clear by the Erie-Lackawanna's petition for reconsideration to the Commission in the merger case, the lack of a capital indemnity provision, a point that may well come before us in the merger case, is important only if N&W's objection to the inclusion order are sustained. Again an important basis for the Commission's rejection of N&W's principal objection to the inclusion order, namely, that this should be deferred pending consideration of its merger with C&O-B&O, was that such a postponement would further delay the Penn-Central merger, this ground would appear more weighty to a court which had satisfied itself of the validity of that merger than to one unfamiliar with it. We cite these simply as examples, not as an all inclusive list.

action in this court in which the B&M has intervened, although relevant, in not conclusive in determining what district court should review an order of the Interstate Commerce Commission. Compare Eastern Air Lines, Inc. v. C.A.B. 354 F. 2d 507, 511 (D.C.Cir.1965). While the N&W's winning the race would normally be a sufficient reason for deferring to the District Court for the Western District of Virginia, with the D&H and the B&M having the right to intervene there, if the inclusion order stood alone, this may not be so when review of the inclusion order in this court, equally feasible in light of our grant of the motion of the United States and the Interstate Commerce Commission to join the N&W, would have the advantage of bringing the merger order and the closely related inclusion order before the same court. With only questions of law at issue and with an appeal as of right to the Supreme Court the considerations that usually favor allowing the plaintiff that has won the race to the courthouse to retain his victory lose much of their force. Indeed, the Amended Pre-Trial Order of the District Court for the Western District of Virginia made clear that the continuance of the N&W's action "shall not be construed to preclude any party from applying to the District Court for the Southern District of New York for an injunction restraining the other parties from the further prosecution of this action."

However, here again we see no sufficient reason for now deciding whether we could or should grant the injunction that is sought. The District Court for the Middle District of Pennsylvania has stayed the action there as we have indicated, the two judges of the District Court for the Western District of Virginia who were present at the hearing on July 11 and signed the Amended Pre-Trial Order of July 14, 1967 were of the view that the issues in Civil Action No. 67-C-51-R should be litigated in this court, and our order of even date has provided for a hearing at what appears to be the earliest practicable time.

We shall therefore leave the motion for an injunction undecided, with leave to the United States or the Interstate Commerce Commission to bring it on for further hearing on five days notice if occasion therefore should arise.

HENRY J. FRIENDLY
U.S.C.J.

RICHARD H. LEVET
U.S.D.J.

EDWARD WEINFELD
U.S.D.J.

26 July, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE DELAWARE AND HUDSON RAILROAD CORPORATION, *Plaintiff*,

BOSTON AND MAINE CORPORATION, *Intervening Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*,
INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*.

67 Civ. 2451

Memorandum on Motions to Set Schedule and to Join N & W.

The United States of America and the Interstate Commerce Commission have moved this Court to establish an expedited briefing schedule in this action; appended to their motion is a copy of the Amended Pre-Trial Order of the District Court for the Western District of Virginia in Norfolk and Western Railway Co. v. United States of America, Civil Action No. 67-C-51-R. We note the statement of the two judges signing this order that it appeared to them "that the issues raised in this action should be liti-

gated in the United States District Court for the Southern District of New York," and the continuance of the Virginia action for a hearing by the full court including that issue on September 26, 1967. We note also that in directing the continuance the court made clear that this "shall not be construed to prevent or delay consideration by the United States District Court for the Southern District of New York of all the issues raised in this action" and provided that "any party may file copies of the brief which it has filed on the same issues in the Southern District of New York in lieu of filing original briefs in this action."

In light of the evident belief of the two judges in the Western District of Virginia that we should go forward with this action and of the Supreme Court's mandate for expedited hearing and early determination, we think it is incumbent on us to set a schedule that will permit our deciding this action as soon as feasible. To that end it is

ORDERED that the parties observe the following schedule, which is identical with that established by the District Court for the Western District of Virginia:

(a) Plaintiff and intervening plaintiffs are directed to file any supplemental complaints on or before August 7, 1967, or 7 days following service of the order of the Commission on Petitions for Reconsideration, in Finance Docket No. 21510, *Norfolk and Western Railway Co. and New York, Chicago and St. Louis Railroad Co.—Merger, etc.*, whichever date is later.

(b) Defendant and intervening defendants are directed to file their answers, together with such additional pleadings as may be deemed proper, on or before August 14, 1967, or 14 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later.

(c) Plaintiff and intervening plaintiffs may file responsive pleadings if they deem it advisable on or before

August 21, 1967, or 21 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later.

(d) No additional motions or pleadings may be filed thereafter except by leave of court for good cause shown.

(e) Proposed exhibits, if any, must be filed with the Clerk of the court on or before August 21, 1967, or 21 days following the service of the order of the Commission on Petitions for Reconsideration, whichever date is later. Formal proof of exhibits will be waived unless objected to in writing on or before September 11, 1967, or 42 days following service of the order of the Commission on Petitions for Reconsideration, whichever is later.

(f) The brief of plaintiff and intervening plaintiffs should be filed on or before August 18, 1967, or 18 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later. The brief of defendant and intervening defendants should be filed on or before September 8, 1967, or 39 days following the service of the order of the Commission on Petitions for Reconsideration, whichever is later. Reply briefs, if any, should be filed on or before September 19, 1967, or 50 days following the service of the order of the Commission on Petitions for Reconsideration, whichever date is later. In the event the hearing is set at an earlier date, reply briefs should be filed on or before the hearing date.

The United States and the Commission have also moved for an order under F.R. Civ. P. 19(a) to join the Norfolk & Western as a plaintiff. We see no reason to doubt that such joinder comes within the words and the evident purpose of the greatly broadened provisions of the first sentence of amended Rule 19(a). We are not persuaded that the last sentence of the rule creates an obstacle; joinder of the N & W as an additional party plaintiff would not "render the venue of the action improper." Here venue rests on the act of the D & H in bringing this action and

the defendants' waiver of venue objection; joinder of an addition plaintiff does not defeat venue under 28 U.S.C. § 1398.[1] The motion is therefore granted on condition that such joinder shall not prejudice any contention the N & W may wish to make in any court that the Western District of Virginia is the appropriate forum for review of the inclusion order. Since, in addition to challenging the inclusion order, the Norfolk & Western will doubtless oppose the claims made by the Delaware & Hudson and the Boston & Maine, it may file an additional brief on that issue on or before the date fixed for the filing of briefs by defendants.

The D & H and the B & M also occupy a dual position, as plaintiffs attacking the adequacy of the consideration afforded by the Commission and as defendants answering the N & W's position that the consideration is excessive. Accordingly they also may file an additional brief as defendants answering any such arguments. If Erie-Lackawanna should seek intervention as a defendant, its application will be granted and it may file a brief as such.

On the assumption that the Interstate Commerce Commission will rule on the petitions for reconsideration by mid-August, the action is tentatively set for final hearing, see F.R. Civ. P. 65(a)(2), on September 28, 1967, at 10 A.M.

HENRY J. FRIENDLY
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

RICHARD H. LEVET
U.S.D.J.

26 July, 1967

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[1] The final sentence of the rule seems to have been framed in the light of the then venue provisions as to diversity actions, 28 U.S.C. §1391(a).

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 10054 Civil

BOROUGH OF MOOSIC, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

Brief of Plaintiff and Intervening Plaintiffs in Support of Motion to Vacate Stay

Preliminary Statement

It is clear that, unless this Court acts now to vacate its stay to permit the filing of briefs on both PRR-NYC and N&W Inclusion cases, plaintiff and intervening plaintiffs will be deprived of any effective judicial review of the public interest issues which they raise.

This conclusion is inescapable because the New York Court has separated the PRR-NYC case from the N&W Inclusion case by setting up separate hearing procedures which make it impossible to consider the interrelationship of one case to the other in passing upon the validity of the orders. This interrelationship is basic to the issues raised by these plaintiffs in this case. This interrelationship was emphasized by the United States Supreme Court in its decision in this case. This interrelationship has now been conceded by the I.C.C. and the U.S. Yet, the New York Court's hearing procedures do violence to this interrelationship and make it clear that plaintiff and intervening plaintiffs' theoretical right to litigate in New York is illusory and any attempt to enter the New York Court would be a vain and futile gesture. Moreover, the briefs now on record in New York demonstrate that the parties there have no intention of challenging the basic validity of both orders, which challenge is the central thrust of this action pending in the Middle District of Pennsylvania.

No one will be prejudiced by this court's permitting the filing in this court by these plaintiffs of combined briefs on the merits of the PRR-NYC and N&W Inclusion cases. Final decision on the stay can be postponed until the fall. The filing of briefs will not inconvenience or burden this court; will not interrupt the orderly hearing or disposition of the New York or Virginia cases; and will not inconvenience or burden the other railroad parties, since they will have the option of filing with this court the briefs they will have to prepare and file in any event in the other cases.

Summary of Argument

A summary of the changed circumstances which dictate the stay be vacated or modified are as follows:

1. The New York Court, in splitting two inextricably intertwined matters, has effectively precluded any meaningful judicial review in that forum by plaintiff or intervening plaintiffs herein.

2. The United States and I.C.C. now recognize that PRR-NYC and N&W Inclusion are inextricably intertwined.

3. The New York briefs are outside the scope of Moosic's case.

4. The New York Court does not assert jurisdiction over Scranton and Shapp with respect to N&W Inclusion.

5. This court, at the minimum, should modify its stay so as to permit the filing of briefs to avoid permanent injury to plaintiffs' rights.

6. The mandate of the United States Supreme Court for expedition requires that this court permit the filing of combined briefs.

7. Proposed Briefing Schedule.

Argument

I. The New York Court Has Adopted Procedures Which By Their Very Nature Deny the Substantive Rights of Plaintiff and Intervening Plaintiffs.

Without in any way deviating from its statutory right to have the Middle District of Pennsylvania determine whether Moosic is to become a one-railroad community, plaintiff and intervening plaintiffs wish to point out that it is crystal clear that the Southern District of New York, by its very procedure, has precluded their essential claims from ever being heard. We stress this point because this court's *per curium* memorandum sur motions to stay, dated July 13, 1967, placed great reliance upon anticipated developments in the New York Court.

A. *The Procedure Adopted by New York.* The New York Court has determined to hear the PRR-NYC merger separately from the N&W Inclusion case. Separate briefing and separate argument schedules have been set* That court anticipates that it will pass upon the validity of the PRR-NYC merger prior to its consideration of the N&W Inclusion orders, and that only the timing of the consummation of the former will be related to the latter. (S.D.N.Y., Memorandum Orders of July 3 and July 26, 1967).

Plaintiffs appreciate that the railroads involved in the New York action, being primarily concerned with financial arrangements, prefer that the two cases be tried separately. But this very separation of the two cases per se destroys a central core of Moosic's challenge to the two I.C.C. orders.

B. *The Denial of Moosic's Substantive Case.* The procedure adopted by the New York Court for separate treatment of PRR-NYC and N&W Inclusion prevents Moosic and

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* Petitions for reconsideration are pending at the I.C.C. in both PRR-NYC and in N&W Inclusion. The New York Court schedule has been fixed for PRR-NYC, whereas that for N&W Inclusion awaits a ruling by the agency prior to the commencement of a schedule by the New York Court.

other communities from realistically challenging the two I.C.C. orders. This arises because the validity of the PRR-NYC merger orders will be considered separately in New York, yet such merger can only be tested by reference to what it may directly inflict upon communities served by E-L and D&H. The total effect of the merger, however, is not of record in the PRR-NYC case. It is contained in the N&W Inclusion case, because it was only when E-L and D&H petitioned for inclusion in N&W that the total adverse impact of PRR-NYC came to light for communities served by E-L and D&H. It is therefore impossible to determine the validity of the PRR-NYC merger orders without simultaneously considering the N&W Inclusion orders. If PRR-NYC is litigated separate and apart from N&W Inclusion, then a court can only speculate as to whether the elements *not* considered by the Commission in PRR-NYC are material, and whether further hearings are necessary, or whether both cases should have been consolidated by the agency. One of the difficulties in seeking to set aside an agency order for failure to conduct an inquiry into certain phases of the public interest is a showing that certain matters are truly significant. Here we have important elements not considered in PRR-NYC. Are these matters truly important to warrant setting aside the PRR-NYC merger and remanding the case back to the agency? The damage revealed in the N&W Inclusion case provides important insight. It transforms Justice Brennan's theoretical discussion of what could happen into reality.

The prejudice to Moosic's case by hearing PRR-NYC and N&W Inclusion separately is obvious. Plaintiff was not a party to PRR-NYC before the agency. Not being served by PRR or NYC, it was totally unaware of the real impact upon the borough by the I.C.C.'s case-by-case handling of the eastern railroad mergers. It was only when the merger movement hit home, i.e., when E-L and D&H, both serving Moosic, petitioned for inclusion in N&W, that the Mayor and Solicitor of the borough instinctively reacted.

It was only then that the borough became involved. And the Commission's April 6, 1966, order in PRR-NYC was prior to the receipt of plaintiff's testimony in N&W Inclusion.

Justice Brennan's opinion is largely devoted to the impropriety of the case-by-case approach followed by the Commission. Moosic does have a substantive cause of action against both I.C.C. orders, and *the impact of the N&W Inclusion must be considered in evaluating whether PRR-NYC is in the public interest, not only in determining when PRR-NYC should be consummated.*

> "An inclusion may turn out to be impossible, either because of inability to work out equitable terms, a circumstance upon which inclusion orders have invariably been conditioned, or because upon full consideration the effects of the contemplated inclusion might be regarded as so detrimental that the proposed merger which made necessary the inclusion would be against the public interest." 386 U.S. at p. 405.

Since the New York Court is proceeding separately, if Moosic were to intervene there it could not realistically participate in PRR-NYC. When that court next turns to N&W Inclusion, Moosic would be in the situation of attacking the defensive action of its two carriers, E-L and D&H, who are seeking to protect themselves from the PRR-NYC merger.

The failure of the New York Court to treat both cases together destroys the only real basis for bringing both actions before a single court. The denial of Moosic's substantive right to set aside both orders would be prejudiced by such procedure.

The New York Court has not adopted the analysis of Moosic's action suggested by this court in its July 13, 1967 *per curiam* memorandum sur motions for stays, wherein it was stated inferentially that plaintiff might attack PRR-NYC and N&W Inclusion together in New York's PRR-

NYC proceeding. The New York Court, on July 26, 1967, considered Moosic's action as severable into a PRR-NYC component and N&W Inclusion component (See: Memorandum on Motions for Injunction). This analysis is a changed circumstance from what might have been contemplated by this court in imposing its stay.

II. The United States and I.C.C. Have Now Recognized That PRR-NYC and N&W Inclusion are Inextricably Intertwined.

The United States and Interstate Commerce Commission did not initially seek to have PRR-NYC and N&W Inclusion before a single three-judge court. It was only *after* Moosic attacked both orders on public interest grounds in a single proceeding in this court that these governmental agencies then sought to bring both orders to New York. But the New York Court has now determined to *hear* and to *decide* each case separately, so that no real purpose has been served in bringing both cases to New York except, perhaps, to give the appearance that the two cases have been brought together as they are in fact in the Middle District of Pennsylvania.

The I.C.C. has now admitted that the PRR-NYC and N&W Inclusion cases are so interrelated that they cannot be severed. We direct the court's attention to the joint I.C.C.-U.S. Memorandum filed July 20, 1967 in New York in support of an Injunction against City of Scranton and Milton J. Shapp*. This document terms PRR-NYC and N&W Inclusion to be "inextricably interrelated", "wholly interrelated", "completely intertwined", *and that this has been true with the agency since June,* 1964.

We thus submit that the Department of Justice can no longer oppose vacation of the stay in this court. It can no longer oppose Moosic's substantive cause of action from being heard, because it has conceded that a single cause of action, rather than two, are before this court.

---

* Filed with this Court by our Memorandum of August 7.

III. The New York Briefs Are Outside the Scope of Moosic's Case.

This Court has before it four briefs filed August 8 in the Southern District of New York.* Three of these briefs are solely concerned with any hiatus between consummation of the PRR-NYC merger and final determination of N&W Inclusion. They do not attack the validity or merits of the merger itself.

Reading Company, alone, attacks any part of the merger order in any realistic respect. It does so on the ground that the agency failed to consider the impact of the merger upon Reading, or whether Reading will be able to survive the interim between consummation of the merger and Reading's inclusion in a major system without interim conditions, or whether Reading should be included in PRR-NYC if it is not included in C&O-B&O or N&W-C&O.

These limited grounds do not approach Moosic's complaint attacking the public interest findings of the merger on matters such as whether the Commission erred in its refusal to hold further hearings because of a stale record. (App. 4 to Moosic's Complaint); whether the Commission's basic economic forecast for the Eastern District is supported by substantial evidence or whether Witness Keyserling's testimony was properly discounted; whether the Commission's legal construction of the "public interest" proviso of Section (5)(2)(c) of the Act is valid (See: Opinion of Justice Douglas in *B&O R.R.* v. *United States),* among other matters.

There is no possible chance that there will be any duplication of issues on the PRR-NYC merger order between the Southern District of New York and the Middle District of Pennsylvania. If this Court does not vacate its stay, the largest corporate merger proposal in U.S. history will go without review at the District Court level.

---

*These briefs were (1) E-L, (2) D&H, (3) Reading, and (4) jointly by B&O, C&O, N&W and WM.

Since this Court gave great weight to the matters which would be raised by the August 8 New York briefs in its *per curiam* memorandum of July 13, the meager contents of these briefs with respect to the essential validity of the merger order constitute a changed circumstance which provides a cogent reason for vacating the stay, at least to the extent of permitting the filing of a combined brief on PRR-NYC and N&W Inclusion.

IV. The New York Court Does Not Assert Jurisdiction Over Scranton and Shapp With Respect to N&W Inclusion.

The New York Court in its July 26, 1967, Memorandum on Motion for Injunction considers the N&W Inclusion orders separate from the PRR-NYC orders. *Scranton and Shapp have not intervened in the N&W Inclusion case in New York.* On this basis, the Middle District of Pennsylvania may clearly proceed with hearing the N&W Inclusion case. However, since N&W Inclusion and PRR-NYC are "inextricably interrelated", "completely intertwined" and "wholly interrelated," consideration of N&W Inclusion necessarily involves PRR-NYC. The orders in N&W Inclusion specifically provide for further consideration of the issues therein if PRR-NYC fails of consummation. We direct the attention of the Court to the joint U.S.-I.C.C. Memorandum in Support of Injunction filed July 20, 1967, in New York. The interrelationship of the two I.C.C. orders is particularly important for City of Scranton since it is not served by PRR or NYC, so that its basic attack on the merger is therefore in large part derivative through the adverse impact upon E-L, D&H and CNJ. The U.S. Supreme Court was aware of this. 386 U.S. at p. 384.

Since the New York Court in its July 26 memorandum clearly separates the Moosic case into two components, there is every reason for the Middle District of Pennsylvania to now vacate its stay.

V. This Court's Stay Must Be Modified to Permit the Filing of Briefs to Avoid Permanent Injury to Plaintiff's Rights.

Surely, permitting the filing of combined briefs is not, in the words of Justice Clark in *B.&O. R.R. Co.* v. *United States,* ". . . too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties". 386 U.S. at p. 392. Surely, this is the least this court can do to make sure that the communities represented in this case are treated fairly. The point is, this relief must be granted *now.* A month or two months from now will be too late for the permission to file briefs because then this court will never be able to catch up with the cases in New York or Virginia. Briefs must be filed here immediately to make it possible for this court to hear the case, or parts thereof, if at a later date the court should ultimately decide to hear the case. Only by setting a briefing schedule now will the court later be in a position to hear the case if it should decide to do so.

By permitting the filing of combined briefs now, this court will not injure or inconvenience any one. By not permitting the filing of briefs now, this court will very possibly be sanctioning damage and prejudice to the communities involved; will be denying them a forum for their grievances; and may render itself powerless to hear this case effectively at a later date. All concerned with this case must be ever mindful of the heavy burden of responsibility which this case entails, as stated by the Supreme Court: "After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country—to the great detriment not only of the parties here but to the public inconvenience and necessity of the entire Nation." Clark, J. 386 U.S. at p. 392. By permitting the filing of combined briefs now—which will not inconvenience or burden either this court, the other federal courts, or the parties—this court will go a long way toward avoiding a violation of Justice Clark's mandate.

This court owes at least as much consideration to Moosic and Scranton, its venue plaintiffs, as the Virginia Court has shown to its venue plaintiff, N&W, in permitting the latter to go ahead with its briefs in the Virginia action. As in Virginia, any party to the New York case should be permitted to file its brief with this court if it so desires.

VI. The Mandate of the United States Supreme Court for Expedition Requires That This Court Permit the Filing of Combined Briefs.

The Supreme Court has made it clear that expedition is mandatory in this case. For this court to decline to permit the filing of a combined brief now would effectively mean either that this court has no intention of ever reaching the merits of this case, in which event this court should so state now, so that plaintiffs know where they stand and may be guided accordingly, or that this court's ultimate consideration of the merits of the case will be delayed, and thus inconsistent with the Supreme Court's mandate for expedition. Obviously, an expedited hearing *later* can only be possible if this court prepares for this eventuality *now*. For example, if this court decides several months from now to hear this case, without moving ahead with briefs in the interim, months of delay will be experienced. Filing of combined briefs now is the only means of insuring expedition later.

VII. Proposed Briefing Schedule.

Plaintiff and intervening plaintiffs propose that this court adopt for the combined PRR-NYC and N&W Inclusion cases the identical pleading and briefing schedule adopted by the Virginia and New York Courts in their respective July 14 and July 26 orders for N&W Inclusion, with the exception that those portions of the agency record relied upon may be filed at the final hearing.

This schedule would commence seven (7) days after the issuance of the Commission's orders on reconsideration in

PRR-NYC and N&W Inclusion, whichever is later in time. This is the same schedule provided by the Virginia and New York Courts for N&W Inclusion.

Conclusion

For the foregoing reasons, this court should vacate its stay forthwith and establish a briefing schedule.

Oral hearing on this motion is requested.

Respectfully submitted,

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August 15, 1967

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 664 Misc.

CITY OF SCRANTON and MILTON J. SHAPP, *Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents.*

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA. AND MOTION FOR LEAVE TO FILE. AND MOTION TO INCLUDE RECORD IN NO. 433 CITY OF POTTSVILLE V. UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. Misc.

CITY OF SCRANTON and MILTON J. SHAPP, *Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents.*

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI

Now come petitioners City of Scranton, a municipality located in Lackawanna County, Pennsylvania, and Milton J. Shapp, a citizen of the Commonwealth of Pennsylvania and a Pennsylvania Railroad Company stockholder with offices in Philadelphia, and respectfully move this Court for leave to file the annexed petition for writ of mandamus or certiorari under Section 1651 of Title 28, United States Code, directed to the District Court of the United States for the Middle District of Pennsylvania, directing the Honorable Francis L. Van Dusen, C. J., Michael H. Sheridan

and William J. Nealon, D.JJ., to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, or in the alternative that this Court review the orders of the United States District Court for the Middle District of Pennsylvania entered July 11, 1967, July 28, 1967 and August 30, 1967 in No. 10054-Civil, *Borough of Moosic* v. *United States,* and for such other and further relief as may be just and proper.

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IN THE

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OCTOBER TERM, 1967

No. Misc.

CITY OF SCRANTON and MILTON J. SHAPP, *Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents.*

MOTION TO INCLUDE RECORD IN NO. 433 CITY OF POTTSVILLE V. UNITED STATES

Now come petitioners City of Scranton and Milton J. Shapp, and respectfully move this Court that the record of the United States District Court for the Middle District of Pennsylvania heretofore submitted with the appeal in No. 433, *City of Pottsville* v. *United*

States, be included by reference in their petition for writ of mandamus or certiorari.

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OCTOBER TERM, 1967

No. Misc.

CITY OF SCRANTON and MILTON J. SHAPP, *Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents.*

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND THE HONORABLE FRANCIS L. VAN DUSEN, MICHAEL H. SHERIDAN, AND WILLIAM J. NEALON, JUDGES FOR THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

City of Scranton, a municipality located in Lackawanna County, Pennsylvania, and Milton J. Shapp, a citizen of the Commonwealth of Pennsylvania and a Pennsylvania Railroad Company stockholder with offices in Philadelphia, pray that a writ of mandamus or certiorari issue to review the action of the United States District Court for the Middle District of Pennsylvania in staying all proceedings in No.

10054-Civil, *Borough of Moosic, et al.* v. *United States, et al.*, a single action which seeks to set aside orders of the Interstate Commerce Commission (I.C.C.) approving and authorizing the merger of The Pennsylvania Railroad Company (PRR) and The New York Central Railroad Company (NYC) and the inclusion of Erie-Lackawanna Railroad Company (E-L), The Delaware and Hudson Railroad Corporation (D&H) and Boston and Maine Corporation (B&M) into the Norfolk and Western Railway Company (N&W), and that the Supreme Court of the United States direct the said United States District Court for the Middle District of Pennsylvania to proceed forthwith to hear and to determine the said complaint of Borough of Moosic and intervening complaints of City of Scranton and Milton J. Shapp. City of Scranton and Milton J. Shapp made separate applications for intervention on June 27, 1967, which were granted by the District Court on July 11, 1967.

OPINIONS BELOW

The order of the District Court granting the motion of the United States and intervening defendants for a stay of further proceedings was entered July 11, 1967 and is reproduced in Appendix A of *No.*——, Misc., *Borough of Moosic* v. *United States District Court for the Middle District of Pennsylvania.*

The per curiam Memorandum Sur Motions of Defendant and Intervening Defendants for a Stay was entered July 13, 1967, and is reproduced in Appendix B of No. ——, Misc., *Borough of Moosic* v. *United States District Court for the Middle District of Pennsylvania.*

The order of the District Court denying Motion to Vacate Stay was entered July 28, 1967 and is repro-

duced in Appendix C of No. ——, Misc., *Borough of Moosic* v. *United States District Court for the Middle District of Pennsylvania.*

The further order of the District Court denying Motion to Vacate Stay of Proceedings and Establish A Briefing Schedule was entered August 30, 1967 and is reproduced in Appendix D of No. —— Misc., *Borough of Moosic* v. *United States District Court for the Middle District of Pennsylvania.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1651(a). Exclusive appellate jurisdiction is conferred upon this Court by 28 U.S.C. Section 2325 and Section 1253 of actions to enjoin orders of the I.C.C., and this writ is sought in aid of such exclusive appellate jurisdiction.

QUESTIONS PRESENTED

1. Where two I.C.C. orders are admittedly intertwined and are attacked in a District Court on the basis of the interrelationship of the orders as affecting the public interest, should not this Court order a vacation of a stay of proceeding which has been directed by that District Court because of the pendency of proceedings in other district courts in which the orders are being attacked separately by other persons?

2. Where intervenors join in an attack upon two I.C.C. orders, is it not the clear duty of a District Court to hear their case and should not this Court enforce that duty notwithstanding the District Court's refusal to hear the case because of an appearance of the intervenors in another court with respect to an earlier I.C.C. order which was reversed by this Court?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. Section 1398, 28 U.S.C. 1651(a), 28 U.S.C. 2325 and 28 U.S.C. 1253, and are reproduced in Appendix E of No. —— Misc., *Borough of Moosic* v. *United States District Court for the Middle District of Pennsylvania.*

STATEMENT

City of Scranton and Milton J. Shapp oppose *PRR-NYC*[1] merger and *N&W Inclusion*[2] orders of the Interstate Commerce Commission which were issued separately and simultaneously on June 12, 1967. They were parties to both proceedings before the agency, and were intervenors in the previous action commenced September, 1966 in the Southern District of New York, *Erie-Lackawanna R. Co.* v. *United States,* 259 F. Supp. 964. This petition for a writ of mandamus or certiorari is submitted separately from that of Moosic, Pa., since the prior participation of Scranton and Shapp in the former New York proceeding appears to have been given some weight by the Middle District of Pennsylvania in its stay of Moosic's proceeding, and because Scranton and Shapp desire to inform this Court as to their separate reasons for asserting, pursuant to Rule 30, why relief is not available in any court.

Proceedings Following Mandate in B. & O. R. Co v. United States

The March 27, 1967 opinion and order of this Court in *B. & O. R. Co.* v. *United States,* 386 U.S. 372, were followed by an April 28, 1967 order by the Southern District of New York, as follows:

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[1] Finance Docket No. 21989-90, *Pennsylvania R. Co.-Merger-New York Central R. Co.,* 330 I.C.C. 328.

[2] Finance Docket No. 21510, *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger,* 330 I.C.C. 780.

IT IS ORDERED that:

1. The order of this court entered on October 4, 1966, denying a temporary injunction is vacated;

2. The cause is remanded to the Interstate Commerce Commission for further proceedings not inconsistent with the Supreme Court's opinion of March 27, 1967;

3. The orders of the Interstate Commerce Commission entered on April 6 and September 19, 1966, in Finance Docket No. 21989 and 21990, insofar as they authorize the immediate consummation of the proposed merger between the Pennsylvania Railroad Company and the New York Central Railroad Company, are enjoined pending the completion of the proceedings directed by the Supreme Court.

Pursuant to a conference held June 16, 1967 in chambers attended by the railroad parties, U.S. and I.C.C.,[3] hearing was set for June 28, 1967 on motions (1) by N&W to amend the order on mandate from the Supreme Court so as to embrace the June 12, 1967 order of the I.C.C. in *PRR-NYC* and (2) by PRR and NYC to require that Scranton and Shapp file supplemental complaints against the *PRR-NYC* merger order or suffer dismissal with prejudice.

Scranton and Shapp did not join in the request of N&W and other railroad parties seeking further injunctive relief against *PRR-NYC* by amendment of the order on mandate or otherwise.[4] Prior thereto

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[3] City of Scranton and Shapp were not invited to this conference with the three New York judges.

[4] The principal authority for this motion by N&W was *Helene Curtis Industries* v. *Sales Affiliates,* 247 F. 2d 940 (2d Cir. 1957).

they had applied to the Middle District of Pennsylvania to participate in Moosic's request for injunctive relief, and were of the opinion that the old suit in the Southern District of New York was completed when the Supreme Court remanded the action to the District Court with instructions that the cause be remanded to the I.C.C. for further proceedings.[5]

At the June 28, 1967 hearing in New York, Scranton and Shapp opposed the PRR and NYC show cause order that they be required to file new complaints in New York attacking the *PRR-NYC* merger.

The July 3, 1967 memorandum order of the Southern District of New York amended the April 28, 1967 order on mandate as follows:

> "3. The orders of the Interstate Commerce Commission entered on April 6 and September 19, 1966, and served June 12, 1967, insofar as they authorize immediate consummation of the merger between the Pennsylvania Railroad Company and the New York Central Railroad Company are enjoined pending the final determination of these actions by this Court and thereafter for such further time, if any, and to such extent and on such terms as this Court may then direct. The period of 180 days fixed by the Commission in its order served June 12, 1967 for exercising the authority there conferred shall not begin to run so long as such injunction remains in effect."

---

[5] Although *B. & O. R. Co.* v. *United States, supra,* reached the Court on an interlocutory injunction, the Court held that the Southern District of New York had sustained the I.C.C.'s order authorizing the *PRR-NYC merger,* 385 U.S. 914. The error corrected in *B. & O. R. Co., supra,* related to the I.C.C. rather than to an abuse of discretion by the District Court in denying an interlocutory injunction. Cf. *Sierra Pac. Power Co.* v. *F.P.C.,* 223 F. 2d 605, 609 (D.C. Cir. 1955), aff'd, *F.P.C.* v. *Sierra Pacific Power Co.,* 350 U.S. 348, 355 (1956). *Pacific Gas & Elec. Co.* v. *F.P.C.,* 272 F. 2d 510 (D.C. Cir. 1958).

The Southern District of New York proceeded on the theory that all the Supreme Court had before it on appeal were motions for interlocutory relief pending the reconsideration the I.C.C. had already granted. In particular, the New York court noted that if the actions remained pending for the amendment of the order on mandate of the Supreme Court, sought by N&W and its allies, then the actions were pending for other purposes as well. The New York court thereupon ordered that Scranton and Shapp file supplemental complaints in *PRR-NYC* on July 17, 1967 or show cause September 18, 1967 why they should not be dismissed with prejudice. (Moosic Mandamus, App. F)

The July 3, 1967 memorandum order of the New York court contemplated that *N&W Inclusion* would not be reviewed in that court. The same memorandum order acknowledged that Scranton and Shapp were intervenors to Moosic's action attacking *PRR-NYC* and *N&W Inclusion* jointly in a single proceeding.

Commencement of Pennsylvania Proceedings

Moosic commenced its consolidated action June 26, 1967. Prior thereto the U.S. and I.C.C. had expressed no objection to having *PRR-NYC* heard in New York and *N&W Inclusion* heard in Virginia. N&W had filed its complaint against the *N&W Inclusion* order June 13, 1967 in the Western District of Virginia. The U.S. and I.C.C. had attended the June 16, 1967 conference in New York with the three judges, filed memoranda June 27, 1967 with the New York court, and at no time did these governmental agencies take action for consolidated consideration of *PRR-NYC* and *N&W Inclusion.*

When E-L brought a complaint against *N&W Inclusion* in the New York court[6] seeking to enforce the I.C.C. order, and made a motion to consolidate *N&W Inclusion* with *PRR-NYC,* E-L was strongly opposed by both PRR-NYC and N&W, the PRR-NYC memorandum stating:

> "The separate report and order in the inclusion case was issued after a separate proceeding upon its own record. The lawfulness of that order must be tested by that report and record. The lawfulness of the orders in the Penn-Central merger case are to be tested by the reports and the record made in Finance Docket 21989 and 21990. Consolidation would not appear likely to save the Court or counsel time or effort in the disposition of those issues, since each must be judged upon its own report and record, and we believe that such consolidation would tend to confuse and delay, rather than clarify and speed, these cases.
>
> "Expedition in the disposition of these cases is imperative and can be accomplished without further delay if the separate cases both move expeditiously to an early determination." (Memorandum of The Pennsylvania Railroad Company and The New York Central Railroad Company in Opposition to the Motion of Erie-Lackawanna Railroad Company for Consolidation, June 27, 1967)

The Moosic action radically changed the position of the other parties. The U.S. and I.C.C. on July 5, 1967 moved the Middle District of Pennsylvania for a stay of further proceedings on the ground that *PRR-NYC* and *N&W Inclusion* were "wholly inter-

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[6] *Erie-Lackawanna Railroad Co.* v. *United States and Norfolk and Western Railway Co.* (U.S.D.C.-SDNY, 67 Civ. 2362). This action was not progressed.

twined" since June, 1964, that the two I.C.C. proceedings were "wholly interrelated" and "completely intertwined", so that all litigation should be now concentrated in New York.[7] PRR and NYC also changed its position somewhat and informed the Pennsylvania Court:

> JUDGE SHERIDAN: I want to ask you one question. In view of what the Supreme Court said, can the New York Court consider the Penn-Central merger without having before it the inclusion case, because the Court said that it is necessary as to the future of the protected railroads and their inclusion, and so forth, be decided prior to the merger?
>
> MR. COUSINS: Your Honor, there's very strong reason to think that that's got to be done.
>
> JUDGE SHERIDAN: I would think it would have to be.
>
> MR. COUSINS: Of course, the N&W has taken quite a different position, but the Supreme Court has put the cases together and they ought to be—many of us here think they ought to be in New York.
>
> (Philadelphia Hearing, Tr. 85)

The Middle District of Pennsylvania on July 11, 1967 granted the motions of U.S., I.C.C., PRR and NYC for a stay of further proceedings. (Moosic Mandamus, App. A and B)

The New York Injunction Motion

Although the Pennsylvania proceedings were stayed, the U.S. and I.C.C. on July 20, 1967 moved in the New York court that Scranton and Shapp be enjoined

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[7] Joint I.C.C.-U.S. Memorandum in Support of Motion to Stay Further Proceedings, pp. 12-13.

from taking any further action in the Middle District of Pennsylvania. At the same time these governmental agencies also moved that N&W be joined as an involuntary plaintiff to the *N&W Inclusion* instituted by D&H in New York,[8] and that a separate pleading, briefing and argument schedule be set for *N&W Inclusion* in New York. That is, the U.S. and I.C.C., although seeking to enjoin Scranton and Shapp in New York on the theory that *PRR-NYC* and *N&W Inclusion* were "inextricably intertwined", "wholly interrelated" and "completely intertwined", did not desire to have *N&W Inclusion* consolidated for judicial review with *PRR-NYC,* and did not seek to join Scranton and Shapp as involuntary plaintiffs to the D&H's *N&W Inclusion* action.[9]

N&W complained to the New York court:

> "Looking back at the hearing before this Court on June 28th, considering that if we had known then that the two courts, Virginia and this court, would each be reviewing a separate order and on separate records, that the Commission refused to consolidate, and that they both be heard on expedited schedule, can anybody that was in that room before this Court on June 28th have believed that we would be here arguing today about Rule 19(a) and injunctions?
>
> "I undertook to go to Greenbriar, to go to Virginia, to go anywhere to get the kind of expedited

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[8] *Delaware and Hudson and Boston and Maine* v. *United States* (U.S.D.C.-SDNY, 67 Civ. 2451). The further report of the I.C.C. in F.D. 21510, issued September 1, 1967, has apparently mooted the D&H complaint.

[9] The Memorandum for the United States in *B. & O. R. Co.* v. *United States,* filed with the Supreme Court November 30, 1966, urged consolidation. (Memo, p. 32)

schedule the government seemed so anxious to achieve. I don't recall the United States or the Commission saying to me at that time, 'Go ahead and get your schedule. Even if you get it, we will come up here and enjoin you from proceeding in Virginia.'

"How did we get into this situation? What has happened to cause this flurry of injunctions, this flurry of stay orders?

"I think it is apparent that the Moosic case is what triggered all this.

* * * * * *

"The Middle District has stayed the Moosic case. We are just here on the momentum of all these stays and injunctions that got filed as a result of the Moosic case.

"The Moosic case is in the hands of the Middle District of (Pennsylvania) and was stayed in favor of the earlier two actions. That problem is behind us."

(New York hearing, July 25, 1967, argument of Counsel Trienens, Tr. 36-37)

The New York court on July 26, 1967 denied the motion of Scranton and Shapp to withdraw from the proceeding, denied the U.S.-I.C.C. request for an injunction against Scranton, Shapp and N&W, and joined N&W as an involuntary plaintiff to the D&H action against *N&W Inclusion* with separate pleading briefing and argument schedule apart from *PRR-NYC*. In its memorandum orders, the New York court considered *PRR-NYC* separate from *N&W Inclusion,* and stated that it entertained no doubt of the power and propriety of enjoining Scranton and Shapp insofar as it related to *PRR-NYC,* but that *N&W Inclusion* was a closer question. As in its memorandum

order of July 3, 1967, the New York court again stated it would first pass upon the validity of the *PRR-NYC* order, and that the subsequent determination of the *N&W Inclusion* order would bear upon the timing of the consummation of *PRR-NYC*.

Scranton and Shapp stated to the New York court at the July 25, 1967 hearing that the public interest issues in *PRR-NYC* and *N&W Inclusion* must be heard together. Judge Friendly stated that petitions for reconsideration were pending in *N&W Inclusion* which could not be ignored in a briefing schedule for that case, and that the court was sticking to its schedule in *PRR-NYC*.

Scranton and Shapp filed formal objections to the New York court's requirement that they file supplemental complaints in *PRR-NYC* on or before August 2, 1967.[10]

The Second and Third Pennsylvania Stay Orders

The Middle District of Pennsylvania on July 28, 1967 declined to vacate its stay, relying in large part upon the July 26, 1967 orders of the New York Court. (Moosic Mandamus, App. C) A further motion to vacate the stay was denied by the Middle District of Pennsylvania on August 30, 1967. (Moosic Mandamus, App. D). This motion had been made so that the Middle District of Pennsylvania could review the briefs filed in the New York Court by the railroad parties, as contemplated by the July 13, 1967 stay order.

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[10] The report on reconsideration in *N&W Inclusion* was released on August 14, 1967. *PRR-NYC* order on reconsideration was issued on September 11, 1967.

REASONS FOR GRANTING THE WRIT

1. Unavailability of Relief

Since the *PRR-NYC* and *N&W Inclusion* orders are conceded by the U.S. and I.C.C. to be "wholly intertwined", it follows that it is prejudicial to Scranton and to Shapp, as well as other communities in Pennsylvania, the only parties attacking the fundamental validity of both orders in any court, to have their single cause of action split into two components by participating in the New York proceeding. For example, City of Scranton is not served directly by PRR or NYC, but it is so served by E-L, D&H and CNJ. The adverse impact of losing the competitive services of E-L and D&H by both lines coming under common control by N&W, and the coordination of facilities eventually planned for the Scranton-Wilkes Barre-Binghamton area, were not considered by the agency in *PRR-NYC*. Yet *N&W Inclusion* is a transaction required by *PRR-NYC* to save E-L and D&H from complete destruction. One of the difficulties in seeking to set aside the order in *PRR-NYC* for failure to consider certain matters is a showing that such omitted considerations are truly significant. Since the premise for *N&W Inclusion* is that E-L, D&H and B&M will be destroyed by *PRR-NYC,* the injury to the Scranton area might be outweighed by the greater peril from a *PRR-NYC* merger. Accordingly, Scranton might well fail to set aside *N&W Inclusion,* standing alone, but if the record in *N&W Inclusion* is considered along with *PRR-NYC,* simultaneously, a reviewing court might well conclude that the I.C.C. erred in approving *PRR-NYC* without further hear-

ings in either or both cases or in failing to consolidate the two proceedings.[11]

On the other hand, N&W maintained strongly before the Middle District of Pennsylvania, Virginia and New York courts, that its obligation to acquire E-L, D&H and B&M must not be enmeshed with judicial review of *PRR-NYC*. Thus, faced with the conflict between Scranton, Shapp and two other communities raising public interest grounds that necessitate consolidated judicial review, on the one hand, and the contention of N&W that it must have a separate proceeding for judicial review of *N&W Inclusion*, on the other hand, the U.S. and I.C.C. have opted for separate proceedings. Further, the release on August 14, 1967 by the I.C.C. of its report on reconsideration in *N&W Inclusion*, 12 days after the August 2, 1967 deadline established by the new York court for supplemental complaints in *PRR-NYC*, effectively precluded consolidated consideration of both matters in that forum.

Relief is also unavailable by the normal appellate process of 28 U.S.C. 1253. The orders of the Middle District of Pennsylvania are not final and likewise do not constitute denial of an interlocutory injunction so long as *PRR-NYC* is enjoined by the Southern District of New York and *N&W Inclusion* is voluntary postponed by the I.C.C. pending judicial review. Mandamus would seem the appropriate remedy to com-

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[11] Indeed, the recent admission of the I.C.C. in both the Middle District of Pennsylvania and Southern District of New York that *PRR-NYC* and *N&W Inclusion* are "completely intertwined", "wholly interrelated" and "inextricably intertwined", strongly suggests that both matters be summarily remanded to the agency for further proceedings and for consolidation. (See opinions of Brennan, J. and Douglas, J. in *B. & O. R. Co.* v. *United States.*)

pel action. *McClellan* v. *Garland,* 217 U.S. 268, 280 (1910); *Ex Parte Bransford,* 310 U.S. 354, 355 (1940); *Stratton* v. *St. Louis S.W.R. Co.,* 282 U.S. 10, 16 (1930)

2. Lack of Prejudice to Any Party

The Middle District of Pennsylvania abused its discretion in staying all proceedings because the resolution of the issues under litigation in New York and in Virginia will not assist materially the disposition of the issues raised in the Middle District of Pennsylvania. Nor will any party be prejudiced by the threat of inconsistent decisions. The majority opinion in *B. & O. R. Co.* v. *United States,* stated at 381:

> "None of the appellant railroads challenge the merits of the merger; however, appellants Milton J. Shapp and the City of Scranton both attack the merger on its merits.

And at page 385:

> "The appellant railroads take varying positions all short of attacking the merits of the merger."

3. The Mandate in B. & O. R. Co v. United States

The Commission reimposed the controversial "Appendix G" interim conditions in its report served June 12, 1967 in *PRR-NYC.* 330 I.C.C. 328. It is unlikely that there would have been any splitting of *PRR-NYC* and *N&W Inclusion* for judicial review purposes had the I.C.C. not again provided for an interval between consummation of *PRR-NYC* and ultimate determination of the fate of E-L, D&H and B&M. The majority opinion in *B. & O. R. Co.* v. *United States* was clear:

> "Furthermore, there would be no occasion for the conditions of Appendix G to be imposed and hear-

ing and decision on this highly controversial matter would not be necessary insofar as the three protected railroads are concerned. Finally, such action would provide the solution to the problem of the necessary and indispensable protection to the three railroads that the Commission found prerequisite to the merger.

"Furthermore, the serious charge that the conditions of Appendix G were imposed without notice and hearing would in large part be dissipated by this course of action." (386 U.S. at 390)

The reimposition of the controversial Appendix G conditions has not only complicated judicial review of *PRR-NYC* and *N&W Inclusion,* but has opened the door to maneuvering by various eastern railroads. B&M, in a reversal of position, now supports prompt consummation of *PRR-NYC,* and CNJ appears to have an understanding with PRR. (Moosic Mandamus, App. G) The chairman of D&H has recently stated that D&H might be part of a New England system or possibly part of a merged *PRR-NYC* system.[12] E-L executives have estimated that inclusion in N&W may be a year or a year and half away.[13] Control of B&M apparently changed on the day following the August 14, 1967 release of the I.C.C.'s report on

[12] "Delaware & Hudson Considers 'Alternative' to Being In in N&W Rail System," *Wall St. Journal,* September 1, 1967. Amoskeag Co. is the largest single holder of D&H stock. Frederic C. Dumaine, Jr., president of Amoskeag, is chairman, president and chief executive officer of Delaware & Hudson Co., which controls the Delaware & Hudson Railroad. Amoskeag Co. increased to 9.44% its holdings in Delaware & Hudson. *Wall St. Journal,* August 30, 1967.

[13] "Erie Meeting Votes to Accept I.C.C.'s Plan", *N.Y. Times,* August 29, 1967.

reconsideration in *N&W Inclusion.*[14] PRR made an offer to acquire Reading.[15]

Hearings at the I.C.C. in Finance Docket No. 23832, the proposed N&W-C&O merger, are nearing completion. Where will the smaller roads really find their homes? The entire railroad unification situation in the east is shrouded in mystery. The reimposition of Appendix G in *PRR-NYC* by the agency, with the resultant judicial review of *PRR-NYC* in a separate proceeding from *N&W Inclusion,* has been a major factor.

If the stay imposed by the Middle District of Pennsylvania is vacated, and judicial review of the public interest issues in both I.C.C. orders allowed to proceed simultaneously, proper judicial dispatch will be afforded.

CONCLUSION

Petitioners pray that a writ of mandamus issue from this Court directed to the Honorable United States District Court for the Middle District of Pennsylvania, and to the Honorable Judges of said Court, requiring the Honorable Francis L. Van Dusen, Michael H. Sheridan and William J. Nealon to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing the said judges to hear and determine *Borough of Moosic,*

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[14] "Control of Boston & Maine Holding Firm Apparently Shifts; 4 Directors Sell Stock," *Wall St. Journal,* August 16, 1967.

[15] "Reading Road, in Surprising Turn, Holding Merger Talks With Pennsy, Central Lines," *Wall St. Journal,* July 10, 1967; "Pennsy and Central Drop Merger Bid to Reading," *N.Y. Times,* July 12, 1967; "Dissidents Revive '65 Reading Suit—3 Directors Charge Merger Was 'Wrongfully Rejected' ", *N.Y. Times,* August 31, 1967.

et al. v. *United States, et al.*, No. 10054 Civil, pending in the United States District Court for the Middle District of Pennsylvania.

In the alternative, petitioners pray that a writ of certiorari issue to review the orders entered that stay further proceedings in *Borough of Moosic, et al.* v. *United States, et al.*, No. 10054 Civil, pending in the United States District Court for the Middle District of Pennsylvania.

Petitioners pray for such additional relief and process as may be necessary and appropriate in the premises.

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September 14, 1967

Nos. 663 and 664 Misc.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1967

BOROUGH OF MOOSIC, PETITIONER,

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND UNITED STATES OF AMERICA, ET AL.

CITY OF SCRANTON AND MILTON J. SHAPP, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND ON MOTIONS FOR LEAVE TO INCLUDE RECORD IN NO. 432, CITY OF POTTSVILLE v. UNITED STATES

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 663 Misc.

BOROUGH OF MOOSIC, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND UNITED STATES OF AMERICA, ET AL.

No. 664 Misc.

CITY OF SCRANTON AND MILTON J. SHAPP, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND ON MOTIONS FOR LEAVE TO INCLUDE RECORD IN NO. 433, CITY OF POTTSVILLE v. UNITED STATES

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI

Invoking the powers of this Court under the All Writs Act, 28 U.S.C. 1651(a), the Borough of Moosic, the City of Scranton and Milton J. Shapp, seek

278-089—67

review of the action of the United States District Court for the Middle District of Pennsylvania in staying until October 1, 1967, all proceedings in *Borough of Moosic* v. *United States, et al.*, Civil Action No. 10054.[1] The original plaintiff in the district court, petitioner Borough of Moosic, located in Lackawanna County, Pennsylvania, brought the action on June 26, 1967,[2] to annul and set aside the orders of the Interstate Commerce Commission (a) authorizing the merger of the Pennsylvania Railroad and the New York Central Railroad Company[3] and (b) requiring the inclusion of the Erie-Lackawanna Railroad Company, the Delaware and Hudson Railroad Company and the Boston and Maine Corporation in the Norfolk and Western Railway system.[4] The two orders of the Commission relate to the remand by this Court, last Term, of *Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372, in which the Court ordered the Commission not to permit the Penn-Central merger to be consummated until the future of the Erie-Lackawanna, the Delaware and Hudson, and the Boston and Maine railroads was determined (see *id.* at 378 and 390).

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[1] We do not oppose the motion to incorporate, by reference, the record in No. 433, *City of Pottsville* v. *United States*, a case involving an attempt by the City of Pottsville to intervene in the proceeding below.

[2] On July 11, 1967, the court granted the applications of petitioners City of Scranton and Milton J. Shapp to intervene in the proceeding.

[3] *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, 330 I.C.C. 328.

[4] *Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company—Merger etc.*, 330 I.C.C. 780, modified, 331 I.C.C. 22.

On June 9, 1967, after this Court rendered its *Baltimore & Ohio* decision, the Commission issued its decision ordering the inclusion of the three roads in the Norfolk and Western system. *Norfolk and Western Railway Company and New York, Chicago and St. Louis Railroad Company—Merger etc.*, 330 I.C.C. 780, modified, 331 I.C.C. 22. At the same time, in the remanded *Penn-Central* proceeding, the Commission established protective conditions for the three roads until their inclusion in Norfolk and Western and again authorized consummation of the Penn-Central merger. *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, 330 I.C.C. 328. On June 20, 1967, the federal district court in New York in which the original action to set aside the Commission's merger order—the action reviewed by this Court in *Baltimore & Ohio*—had been brought was asked to enjoin implementation of the Penn-Central merger order until the validity of the inclusion order was finally determined. On July 3, 1967, it ordered all plaintiffs and intervening plaintiffs (including the present petitioners Scranton and Shapp) to file supplemental complaints by July 17, 1967; set the case down for final hearing on September 18, 1967;[5] and temporarily enjoined the merger order. Parties failing to present their challenges by that date without good cause were to be dismissed with prejudice. Petitioners Shapp and City of Scranton have declined to file supplemental complaints.

[5] This schedule was followed and the case is now under submission.

Immediately following release of the Commission's inclusion order, the Norfolk and Western filed an action in a federal district court in Virginia on June 13, 1967, to set it aside (*Norfolk and Western Railway Company* v. *United States,* No. 67–C–51–R, W.D. Va.), and the Delaware and Hudson filed a similar action on June 23, 1967, in the Southern District of New York[6] (*Delaware & Hudson R. Corp.* v. *United States,* 67 Civ. 2451, S.D.N.Y.). Subsequently, on June 26, 1967, petitioner Borough of Moosic filed the instant action, in the Middle District of Pennsylvania, challenging both the merger and inclusion orders.[7] Other interested parties indicated that they were contemplating filing additional actions in still other district courts. The United States and the Commission urged all parties to present their challenges to these orders in the one court that had familiarity with the controversy—the Southern District of New York—and, in a hearing before that court on June 28, 1967, declared that no objections to venue there would be interposed by the government against any party litigating in that forum.

To the same end, the United States and the Commission moved in the Virginia and Pennsylvania courts to stay further proceedings in those actions until the New York actions were finally determined.

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[6] The Erie-Lackawanna, Boston and Maine and various other parties have intervened in that action and the Norfolk and Western has been made an involuntary party plaintiff under F.R. Civ. P. 19(a). The case was briefed on an expedited schedule and argued on September 28, 1967, before the same three judges now considering the *Penn-Central* case.

[7] The government has not yet answered the complaint as the district court's stay order, entered July 11, 1967, was entered before the answer was due.

The Virginia court continued its proceedings until after the decision of the New York court should become available to it. The Pennsylvania court, however, issued a stay only to October 1, 1967;[8] this is the order challenged by the instant petitions. The government moved for a continuance of this stay until the New York court ruled, and on September 29, 1967, the court below scheduled a hearing for October 27, 1967, "to consider appropriate action on the status of the stay of proceedings and alternative requests of counsel."[9]

Since the district court's stay has, by its own terms, now expired, the instant petitions are moot. See *Schlagenhauf* v. *Holder,* 379 U.S. 104, 109, n. 3; *Oil Workers Unions* v. *Missouri,* 361 U.S. 363. Also, since a hearing to determine the future course of this litigation will shortly be held by the district court, a decision by this Court on whether the district court may extend the continuance would be premature.[10] In addition, we submit that the decision of the court below to stay its own proceedings while other cases challenging the same Commission orders proceed to determination is within its sound discretion (*Kansas City Southern Ry.* v. *United States,* 282 U.S. 760, 763–764; *Landis* v. *North American Co.,* 299 U.S. 248, 254–255; *Smith* v. *M'Iver,* 9 Wheat. 532, 535), and does not warrant review by

[8] A motion by petitioners to vacate the stay was denied by the district court on August 30, 1967.

[9] The district court's order is reprinted in the Appendix, *infra,* p. 7.

[10] If the New York court has not decided the *Erie-Lackawanna* and *Delaware & Hudson* cases by the time of the October 27 hearing, we expect to urge the court below to grant our pending motion to continue the stay until the New York court has ruled.

extraordinary writ in this Court. *E.g., De Beers Consol. Mines* v. *United States,* 325 U.S. 212; *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 382–383.

The petitions for extraordinary writs should be denied.

Respectfully submitted.

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OCTOBER 1967.

APPENDIX

United States District Court for the Middle District of Pennsylvania

No. 10054 Civil

BOROUGH OF MOOSIC, PLAINTIFF, AND MILTON J. SHAPP AND CITY OF SCRANTON, INTERVENING PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, NEW YORK CENTRAL RAILROAD COMPANY, PENNSYLVANIA RAILROAD COMPANY, CITY OF PHILADELPHIA, AND ERIE-LACKAWANNA RAILROAD COMPANY, INTERVENING DEFENDANTS

Order To Be Filed No Later Than September 30, 1967, but After the Southern District of New York Acts, if It Does Act by September 30, 1967

Hearing will be held on October 27, 1967, at the United States Courthouse, Philadelphia, Pennsylvania, at 11:00 A.M., EDST, to consider appropriate action on the status of the stay of proceedings and alternative requests of counsel.

Plaintiffs are to file and serve a written statement of their requests on or before October 15, 1967, and defendants are to file and serve their requests on or before October 25, 1967.

MICHAEL H. SHERIDAN,
Judge.

Dated: September 29, 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT OF THE UNITED STATES

Nos. 433, 778, 779, 830, 831, 832, 833, 834, 835, 836, 663 Misc., and 664 Misc.—OCTOBER TERM, 1967.

Penn-Central and N & W Inclusion Cases.	On Appeals From the United States District Court for the Southern District of New York, on Appeal and on Motion for Leave to File Petition for Mandamus or Certiorari to the United States District Court for the Middle District of Pennsylvania.

[January 15, 1968.]

MR. JUSTICE FORTAS delivered the opinion of the Court.

These cases again bring before us problems arising from the program to merge the Pennsylvania and New York Central railroads and related problems proceeding from an Interstate Commerce Commission order that certain railroads be included in the Norfolk & Western (N & W) system. The merger and the inclusion orders are part of a vast reorganization of rail transportation implementing the congressional policy of encouraging consolidation of the Nation's railroads into a "limited number of systems." Transportation Act of 1920, 21 Stat. 481 (1920). That policy has been with us, in one form or another, for more than 45 years. The original idea of the 1920 Act, that the ICC would formulate a national plan of consolidation, proved unworkable. It ran into heavy opposition from carriers and eventually had to be abandoned. The 1920 Act was replaced by the Transportation Act of 1940, 54 Stat. 906, 49 U. S. C. § 5 (2)(b), which governed the Commission's examination of the

present transactions. Under the 1940 Act, the initiation of merger and consolidation proceedings is left to the carriers themselves, and the Commission possesses no power to compel carriers to merge. However, the congressional directive for a limited number of railroad systems has not been changed. The only change has been in the means of achieving that goal. See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 315–321 (Appendix) (1954).

The Pennsylvania and the New York Central dominate rail transportation in the Northeast. Their freight operations extend over some 20,000 miles of road in 14 States and Canada. They are the two largest passenger carrying railroads in the United States. In 1965 their combined operating revenue surpassed $1,500,000,000 and their combined net income was more than $75,000,000. As independent lines, Pennsylvania and New York Central are, to some extent, in direct competition for rail traffic. There are 32 urban areas in which the two lines are in competition with each other and in which no other rail facilities are available. The two roads operate at 160 common points or junctions and have a substantial amount of parallel trackage and routes. The proposed merger which the ICC has approved contemplates the unification of these vast roads and, as time goes on, the rationalization and elimination of some of the dual facilities and services in various areas and in various respects. The merger will result in "enormous savings in transit time." It is estimated that in eight years, the savings in expense will amount to more than $80,000,000 annually. See *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372, 379–381 (1967).

At the same time the combination of these two roads will directly and adversely affect various smaller railroads in the service area because of the more effective competitive service that the combined system will offer and

because of the tendency of the combined roads, unless restrained by law, to favor their own system rather than to share traffic by interchange with nonsystem roads.

In brief, the antecedents of the issues before us are as follows: the Penn-Central merger has been under consideration by the parties and the Commission for about 10 years. It was preceded by the vast N & W-Nickel Plate merger, which the Commission approved in 1964. That transaction, which, it is anticipated, will eventually produce savings for the N & W system of over $29,000,000 annually, resulted in a large rail network covering some 7,000 miles of track and extending in the north from Des Moines and Kansas City to Buffalo and Pittsburgh, and in the southern tier from Cincinnati to Norfolk. See *Norfolk & Western Railway Co. and New York, Chicago, and St. Louis Railroad Co.—Merger, etc.*, 324 I. C. C. (1964). The transaction was not presented to this Court for review.

In 1962 the parties to the Penn-Central transaction signed an agreement of merger including 36 rail-carriers. The merger agreement did not include the New York, New Haven, and Hartford Railroad (NH), although that road requested inclusion.

Following the merger agreement, the parties submitted the proposal to the Commission for approval under § 5 (2) of the Interstate Commerce Act. Exhaustive hearings were held in which states, municipalities, railroads, shippers, and public bodies—some 200 parties in all—took part. The Commission's own staff participated extensively as did the Department of Justice acting for affected interests of the United States other than the regulatory functions of the Commission. All participants, with relatively minor exceptions to which we shall later advert, agreed that the merger itself would be in the public interest. There were sharp differences, however, with respect to certain issues. These primarily concerned the

provisions to be made for three smaller lines affected by the proposed merger: the Erie-Lackawanna (E–L), Delaware & Hudson (D & H), and Boston & Maine (B & M) railroads. The Commission approved immediate consummation of the merger, subject to a reservation of jurisdiction to establish protective provisions for the three roads. *Pennsylvania Railroad Company and New York Central Railroad Company—Merger*, 327 I. C. C. 475 (1966). Its order was approved by a three-judge court in the Southern District of New York. *Erie-Lackawanna Railroad Co.* v. *United States*, 259 F. Supp. 964 (1966).

At the last Term of Court, we reversed. We noted that the Commission itself had found that the survival of the E–L, D & H, and B & M was essential to the public interest and that these roads would be so seriously affected by the competition of the merged company that they might not be able to survive unless adequate protective arrangements were made. In these circumstances we concluded that the Commission should have determined the means to preserve the "protected roads," on both an interim and a permanent basis, before permitting consummation of the merger. We expressly stated that we were not passing upon the validity of the merger or the "peripheral points posed by the various parties." *Baltimore & Ohio R. Co.* v. *United States*, *supra*, at 378.

The Court noted that in 1965 each of the three "protected roads" had filed applications for inclusion in the N & W system, and that these were pending before the Commission in the N & W-Nickel Plate merger case pursuant to the Commission's continuing jurisdiction over those proceedings. We further noted that the Commission, pursuant to its power under § 5 of the Act to require as a condition of approval of a merger that other railroads be included in the merger, had obligated the merged N & W system to include the E–L, D & H,

and B & M if the Commission should so direct, upon such equitable terms as the Commission might prescribe. We stated that if the three protected roads were ordered to be included in the N & W system, "such action would provide the solution to the problems of the necessary and indispensable protection to the three railroads that the Commission found prerequisite to the merger." 386 U. S. 390.

In accordance with our remand of the Penn-Central merger case, the Commission conducted further proceedings in the N & W case on the pending petitions of the three roads. On June 9, 1967, it issued its decision to the effect that "inclusion of the petitioners in the N & W system is preferable to their inclusion in the Penn-Central," and ordering N & W to acquire the stock of the three roads on prescribed terms. *Norfolk & Western Railroad Company and New York, Chicago, and St. Louis Railroad Company—Merger, etc.*, 330 I. C. C. 780, 796 (1967). At the same time, in the remanded Penn-Central merger proceedings, the Commission reconsidered certain protective conditions it had previously devised to aid the three roads, imposed amended protective conditions to operate in the interim between consummation of the Penn-Central merger and the protected lines' inclusion in a major railroad system,[1] and again authorized the immediate consummation of the Penn-Central merger. *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, 330 I. C. C. 328 (1967).

On July 3, 1967, on application of parties opposing the Commission's merger order, the three-judge District Court for the Southern District of New York enjoined implementation of that order pending the decision of

[1] See pp. 19–20, *infra*.

that court on review. Actions were also filed by several parties in the same court to set aside the inclusion order of the Commission requiring the N & W to include the three protected roads in its system. Suits challenging both the merger and inclusion orders were instituted in other courts, but were stayed so as to permit orderly disposition of the basic issues in the Southern District of New York.[2] After expedited proceedings in that court, all complaints attacking the merger and the inclusion order were dismissed [3] and the decisions of the Interstate Commerce Commission in both the merger and the inclusion proceedings were sustained. — F. Supp. —. Various of the parties then sought relief in this Court. Because of the importance and urgency of the matter, we granted a further stay of the merger order, consolidated all proceedings that were before us relating to the merger and inclusion decisions, and expedited consideration thereof. See — U. S. —.

We have before us nine appeals, on behalf of 17 parties, from the decision of the District Court. Also docketed are two related petitions for mandamus or certiorari to the District Court for the Middle District of Pennsylvania, and one appeal from that court.

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[2] See Memorandum Order of the District Court, issued July 3, 1967. Circuit Judge Friendly, for the District Court, noted that "litigation in six or more different district courts has seemingly been averted and all issues concentrated in a single court of first instance." We agree that this is commendable. If review of the inclusion decision and of the merger decision were in different courts, the difficulties presented by these cases would be multiplied.

[3] The Central Railroad of New Jersey (CNJ) asked and was granted a dispensation from the District Court's schedule for briefs and argument. The CNJ has reserved the right to assert that the Commission's order should contain certain protective conditions for it. It has waived the right to argue that the Penn-Central merger should be delayed. The complaint of the CNJ was not dismissed with the others and the Southern District of New York has yet to consider the position of this line.

The particular contentions urged upon us, in this multiplicity of proceedings, are many and varied. In general, however, the issues may be articulated as follows: Has the mandate of this Court been fulfilled, in that appropriate provision has now been made for the three smaller roads? Are the terms of the order providing for inclusion of the protected roads in the N & W system fair and equitable and in the public interest? Did the District Court err in refusing to enjoin consummation of the Penn-Central merger? Has adequate provision been made for resolution of the "peripheral" issues presented by the parties, which would not be foreclosed by a decision authorizing the consummation of the merger and inclusion of the protected roads in the N & W?

I. The Merger Decision.

A. In general.

Most of the parties before us are in accord that the merger is in the public interest and should be consummated as promptly as possible. Those urging immediate consummation before this Court include the Department of Justice and the Commission, the States of Pennsylvania, Connecticut, Rhode Island, New York, Massachusetts, and New Jersey; the Railway Labor Executives' Association; the trustees of the NH; the Pennsylvania and New York Central railroads; B & M; and, in substance, the E–L, D & H, and N & W and its allies. While this consensus has reduced the attacks upon the merits of the merger to a minimum, considering the vast size and implications of the transaction, we must nevertheless address ourselves to the basic merits of the merger as well as to the specific objections that are before us.

With respect to the merits of the merger, however, our task is limited. We do not inquire whether the

merger satisfies our own conception of the public interest. Determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute. The judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substantial evidence. See, *e. g., Illinois C. R. Co.* v. *N & W. R. Co.*, 385 U. S. 57, 69 (1966).

Section 5 of the Transportation Act of 1940, 54 Stat. 893, 49 U. S. C. § 5, sets forth the National Transportation Policy that is to guide the Commission in its scrutiny of mergers proposed by railroads. The Commission is to approve such proposals, pursuant to the terms of § 5 (2)(b) of that Act, when they are made upon just and reasonable terms and are "consistent with the public interest." In reaching its decision, the Commission is to give weight to a number of factors, such as: "(1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

We find no basis for reversing the decision of the District Court that the Commission's approval of the merger is in compliance with law and the statutory standards, and is based on adequate findings supported by substantial evidence. We shall first discuss considerations which are basic to the statutory standards, and we shall then turn to certain particular objections which have been made.

It is, of course, true that the policy of Congress, set forth in the Transportation Act, to consolidate the rail-

roads of this Nation into a "limited number of systems" is a variation from our traditional national policy, reflected in the antitrust laws, of insisting upon the primacy of competition as the touchstone of economic regulation. Competition is merely one consideration here. See *Seaboard Airline R. Co.* v. *United States*, 382 U. S. 154 (1965). This departure from the general and familiar standard of industrial regulation emphasizes the need for insistence that, before a rail merger is approved, there must be convincing evidence that it will serve the national interest and that terms are prescribed so that the congressional objective of a rail system serving the public more effectively and efficiently will be carried out. Obviously, not every merger or consolidation that may be agreed upon by private interests can pass the statutory tests.

Examination of the record and the findings in the present case, however, satisfies us that the Commission has properly and lawfully discharged its duties with respect to the merits of the merger. In these elaborate and lengthy proceedings the Commission has considered evidence tendered by others and compiled by its own staff. Upon the aggressive suit of parties representing conflicting interests, it has analyzed every pertinent aspect of the merger and the inclusion order. It has weighed conflicting viewpoints on all of the fundamental issues and many that are tangential. As the Commission concluded, the evidence before it, with negligible exceptions, attested to the probability of significant benefit from the merger, not only to the railroads and their investors, but also to shippers and the general public.

The Commission carefully considered the implications of the fact that the Pennsylvania and the New York Central, as individual systems, have operated at a profit, and that there are reasonably good prospects for a continuation of such operation. But it was impressed by the fact

that, as individual systems, these profits are not sufficient to put the roads in a position to make improvements important to the national interest, including the maintenance of services which, although essential to the public, are not self-supporting, and furnishing assistance to other roads serving public needs in their general territory. The Commission emphasized that the merger would enable the unified company to "accelerate investments in transportation property and continually modernize plant and equipment . . . and provide more and better service." 327 I. C. C. 475, 501. And it pointed out that only by permitting the merger would it be possible for the Commission to compel Penn-Central to come to the rescue of the New Haven, as we shall describe.

With respect to the lessening of competition where it now exists between the roads to be merged, the Commission pointed out that it will retain continuing power over reductions of service and facilities which are not specifically approved in the merger plans. Such consolidations and abandonments will have to be presented to the Commission for its approval and may be subjected to public criticism and hearings and to conditions or disapproval. It also noted that the rail service by the merger companies will remain subject to vigorous competition from other roads, including the N & W and the C & O–B & O systems, and from motor, water, and air carriers. The Commission summarized some of the factors which would act as a restraint upon the merged company as follows:

> "The power of shippers to direct the routing, the availability of numerous routes in a dense network of interline routes, the influence of connecting carriers in preventing a deterioration in service on the joint routes in which they participate, the growing strength of the N & W and C & O–B & O systems, all stand to provide a check against any abuse of

economic power by the merged applicants." 327 I. C. C., at 514.

Considering the record, and the findings and analysis of the Commission, we see no basis for reversal of the District Court's decision that the Commission's "public interest" conclusions are adequately supported and are in accordance with law. We find no basis, consonant with the principles governing judicial review, for setting aside the Commission's determination, approved by the District Court, that the "public interest" directives of the governing statute have been reasonably satisfied: that the transaction is likely to have a beneficial and not an adverse effect upon transportation service to the public; and that, as we shall discuss, appropriate provisions have been made with respect to other railroads that are directly affected by the merger.

B. OBJECTIONS OF CERTAIN PENNSYLVANIA INTERESTS.

The only objectors in this Court to the public interest findings with respect to the merger are certain interests in the State of Pennsylvania. Appeal No. 835 was taken by the City of Scranton and Milton J. Shapp, a stockholder in the Pennsylvania Railroad Company. These parties filed complaints in the Southern District of New York challenging the Commission's original merger decision. After this Court's remand last Term, they were ordered by the District Court to file supplemental complaints. They declined to comply because, having intervened as plaintiffs in a proceeding challenging the merger in the Middle District of Pennsylvania, they chose to rely upon their asserted right to challenge the Commission's merger and inclusion decisions in the Pennsylvania action. After several warnings, their complaints in the New York Court were dismissed, with prejudice.

The action in the Middle District of Pennsylvania, in which Shapp and Scranton intervened, was filed by the

Borough of Moosic on June 26, 1967, to set aside the Commission's orders, entered after our remand, approving the Penn-Central merger and the inclusion of the three protected roads in the N & W system. The Pennsylvania court stayed the Moosic proceeding by order of July 11, 1967, on the reqest of the United States and the Commission, for the sound purpose of preventing a multiplicity of litigation regarding the Commission's merger and inclusion decisions. Cf. *United States* v. *Kansas City Southern Ry.*, 282 U. S. 760 (1931). Petitions for certiorari or mandamus, on behalf of Moosic (No. 663 Misc.) and Scranton and Shapp (No. 664 Misc.), seeking to challenge the stay of proceedings entered by the Pennsylvania court, have been filed in this Court. Since it now appears that the Middle District of Pennsylvania has dissolved its stay and commenced hearings, it would be pointless for us to review the stay order. Accordingly, the petitions for mandamus or certiorari are dismissed as moot.

Scranton, Shapp, and Moosic attack the Commission's merger and inclusion decisions along a broad front and claim error in the Commission's basic findings that the Penn-Central merger and inclusion of the protected lines in N & W are in the public interest. The thrust of this argument is that the Commission failed to consider or properly to evaluate the adverse effect of the Penn-Central merger, considered in light of the order requiring inclusion of the three protected roads in the N & W system, upon certain affected communities in the State of Pennsylvania. We do not agree. In its April 6, 1966, opinion approving the Penn-Central merger, the Commission examined the arguments made by participating communities in great detail and stated that the "contentions regarding the adverse effect of the merger on Pennsylvania's economy are not substantiated by the evidence. On this record, the prospects clearly import that the

merger will benefit rather than harm the Commonwealth." 327 I. C. C. 475, 492. At the time it made this finding, the Commission was committed to the proposition enunciated in the April 6, 1966, opinion, that the three protected roads would be included in one of the larger systems because of their inability to survive as independent lines. This Court in its decision last Term emphasized the importance of such inclusion. The Commission's conclusion that the net result of the merger would be beneficial to the State of Pennsylvania is bolstered by the strong position taken by the State in this Court that the decision of the District Court for the Southern District of New York should be affirmed.

As we discuss, *infra*, apart from the general and theoretical argument that the Penn-Central merger and the inclusion of the three roads in the N & W system may harm some Pennsylvania interests, complainants' fears of specific injury resulting from reduction of competition by specific curtailments of service now provided by the three protected lines may be asserted in appropriate proceedings when such curtailment is specifically proposed.

All other complaints of these parties relate broadly and generally to the fundamental and underlying economic problems that are involved in the merger and inclusion decisions: for example, the anticompetitive consequences of these decisions and the financial situation and prospects of the Pennsylvania and New York Central as independent lines. They were all the subject of extensive evidence and were analyzed at length by the Commission. In dismissing the complaints of Scranton and Shapp for failure to go forward, Judge Friendly noted that "while we entertain no doubt of the sufficiency of this [procedural] ground, we think it well to add that . . . we find no merit in the complaints of Shapp and the City of Scranton." The Court remarked that, for the most part, "the attacks (of Scranton and Shapp) simply

represent disagreement with procedural and policy determinations which Congress has committed to the Commission." — F. Supp. —. We find no reason to reverse the judgment of the District Court for the Southern District of New York for dismissing the complaints of Scranton and Shapp for failure to prosecute or to set aside its conclusions as to the lack of merit of their claims, particularly in light of the limited function of judicial review of decisions such as those now before us and the opportunity open to them to challenge proposals which may be made for specific curtailment of service.

Scranton and Shapp, like the Borough of Moosic, wish now to go forward with their complaints in the Middle District of Pennsylvania, in which they seek an injunction against consummation of the Penn-Central merger and the effectiveness of the inclusion order. But Shapp and Scranton were parties to the New York proceedings and the Borough of Moosic had an adequate opportunity to join in the litigation in that court following the stay of proceedings in the Middle District of Pennsylvania. As we noted, *supra*, n. 2, all district courts in which actions to review the Commission's findings or for injunctive relief were filed continued their proceedings in deference to the New York court. All parties with standing to challenge the Commission's action might have joined in the New York proceedings.[4] In these circumstances, it necessarily follows that the decision of the New York court which, with certain exceptions,

[4] The process of the New York court ran throughout the Nation. 28 U. S. C. § 2521. In addition, the United States waived possible objections on venue grounds to appearances by any party in the New York litigation. In these circumstances, it would be senseless to permit parties seeking to challenge the merger and the inclusion orders to bring numerous suits in many different district courts. See, for the provision governing review of administrative agencies in the courts of appeals, 28 U. S. C. § 2112.

we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes. While it is therefore no longer open to the parties to challenge the Commission's approval of the Penn-Central merger and inclusion of the three protected lines in N & W, or its order that immediate consummation of the merger should be permitted, any claims for specific relief, such as particularized objections which may arise from specific proposals for consolidation or reduction of facilities or services, are unaffected by the decision in the present cases. Claims not precluded by the present decisions may be pursued before the Commission or in the courts or both, as may be appropriate. This applies to Shapp, to the City of Scranton, and to the Borough of Moosic as well as to any other affected interests. The proceedings in the Middle District of Pennsylvania are not before us, except as we have dismissed as moot the petitions challenging that court's stay of its proceedings, and it will be the task of that court to determine the effect of the present decision upon the proceedings before it. Scranton, Shapp, and Moosic may, of course, seek such relief, if any, in that court as may be available and appropriate in light of our decision herein.

Finally, we must mention the City of Pottsville, which has appealed to this Court (No. 433). Pottsville's request to intervene in the Moosic action, upon a complaint similar to that of Moosic, was denied by the Middle District of Pennsylvania. Like Moosic, Pottsville had the opportunity—which it failed to seize—to litigate in the Southern District of New York. It appears that a principal basis for denial of Pottsville's request to intervene was the objection interposed by the United States and that this objection will, after our decision in the instant cases, be withdrawn. Upon this representation by the United States, without reference to or any attempt to consider the scope or content of the

action in which intervention is sought, or the issues, if any, which may remain for adjudication in that proceeding, we vacate the decision of the District Court for the Middle District of Pennsylvania denying intervention and remand Pottsville's case to that court for further consideration in light of our decision today.

C. OBJECTIONS OF THE NEW HAVEN'S BONDHOLDERS.

Two appeals, Nos. 830 and 831, have been taken on behalf of bondholders of the New York, New Haven and Hartford Railroad Company (NH). Since 1961 the NH has been in reorganization proceedings under § 77 of the Bankruptcy Act. Despite the shelter of the bankruptcy court, it has been on the verge of financial collapse with the attendant risk to continuance of its rail service. The Commission has found that passenger as well as freight service by the NH is a national necessity and that termination of either would lead to distress in Connecticut, Massachusetts and Rhode Island, and would severely damage New York City and the Nation generally. See *New York, New Haven & Hartford Railroad Co., Trustees, Discontinuance of All Interstate Passenger Trains*, 327 I. C. C. 151 (1966).

The NH competes in a relatively small part of its service area with the New York Central; but in the NH's financial condition, diversion of even a small amount of the Pensylvania's connecting traffic from the NH to the Central would inflict consequential injury. Even without reference to the hazard of such diversion, inclusion of the NH in the Penn-Central combination is the only possibility that has been advanced by any of the parties—including the complaining bondholders—for continued operation of NH, short of the sheer speculation that the States concerned or the Federal Government might take over the road and its operations.

In June 1962, with permission of the bankruptcy court, the New Haven's trustees requested the ICC to make provision under § 5 (2)(d) of the Act for its inclusion in the proposed Penn-Central merger. When the Commission first considered the merger, it stated that "we will require all the New Haven railroad [both passenger and freight operations] to be included in the applicants' transaction"; and in its initial report it provided that "our approval of the merger is conditioned upon such inclusion." 327 I. C. C., at 526–527. It required that the parties to the merger irrevocably stipulate that they would consent to inclusion upon such terms as might be agreed between the NH and the merger parties or, failing this agreement, upon such terms as the Commission might prescribe with the approval of the bankruptcy court. 327 I. C. C. 475, 553.

The trustees of the NH and the two companies conducted lengthy negotiations and finally arrived at an agreement as to inclusion terms dated April 21, 1966, amended October 4, 1966. In July 1967 the NH bankruptcy court warned that New Haven's cash depletion was "so serious that if the present rate of loss continues, there will be insufficient left by late September to meet the payroll." Subsequent improvement of cash position permitted amendment of this dire prediction so that it was expected that operation could be financed to January 1968.

The Commission on August 3, 1967, directed the negotiation of a lease between the New Haven trustees and Penn and Central, to be "immediately available upon consummation of the Penn-Central merger." The parties, however, reported that preparation of a lease in time to meet the New Haven's needs was not possible. Thereupon, the Commission ordered a hearing as to whether a lease, loan, or other arrangement should be made to

assure NH's continued operation until its acquisition by Penn-Central. On November 21, 1967, the Commission issued an order, subject to the approval of the reorganization court, providing (a) terms for the inclusion of the New Haven in the Penn-Central system upon effectuation of the Penn-Central merger; (b) for the Penn-Central to lend $25,000,000 to the New Haven over a three-year period in return for trustees' certificates; and (c) for the Penn-Central to bear 100% of the operating losses of the New Haven during the first year after the merger, 50% in the second, and 25% in the third, subject to a ceiling of $5,500,000 in each year on the total amount that Penn-Central could be required to absorb and subject to termination upon transfer of the New Haven assets. Acceptance of these terms by Penn and Central is a required condition of approval of their merger. The Commission has retained jurisdiction "for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate."

The merits of these provisions are not before us. They have not been reviewed by the reorganization court or by a statutory district court under the applicable statute. The New Haven trustees and the States of Connecticut, Massachusetts, Rhode Island, and New York, as well as the United States, have filed briefs urging this Court to affirm approval of the Penn-Central merger, citing the urgent need for this in order to salvage the New Haven's operations. The attack, so far as the New Haven is involved, has been launched by Oscar Gruss & Son, a holder of approximately 14% of the NH's first and refunding mortgage bonds and by the Protective Committee for that issue, which intervened in Gruss' action below. (Nos. 830 and 831.) The claim is that because continued operation of the New Haven at a loss involves progressive erosion of the bondholders' security and because the interim arrangement does not assure that

Penn-Central will absorb all of the operating losses, we should not permit the Penn-Central merger to be consummated without simultaneous inclusion of the NH. In view of the probable difficulties in reaching agreement for inclusion of the NH which will satisfy its bondholders, it is virtually certain that this would mean lengthy delay during which the NH would not have access to the interim Penn-Central financial aid, and might be faced with collapse of its operations.

The Commission, after hearing the bondholders' contention, pointed out that "It is a fundamental aspect of our free enterprise economy that private persons assume the risks attached to their investments, and the NH creditors can expect no less because the NH's properties are devoted to a public use. Indeed, the assistance the creditors are receiving from the States and would receive from Penn-Central through the sharing of operating losses would raise some of that burden from their shoulders." *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, p. 85 (slip opinion dated Nov. 16, 1967). The District Court, putting aside questions of the standing of the NH bondholders to attack the Penn-Central merger, affirmed the Commission's rejection of the attack.

Continuation of the operations of the NH, which the Commission has found to be essential, can be assured only upon and after effectuation of the merger of the Penn-Central. The bondholders agree that to delay the Penn-Central merger until all proceedings necessary to include the NH have taken place may well mean the end of NH operations. The only realistic way to avoid this is to permit prompt consummation of the Penn-Central merger subject to appropriate conditions respecting the New Haven which Penn-Central will perforce accept by its act of merger. While the rights of

the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrified for the strategic purposes or protection of a class of security holders whose interests may or may not be served by the destructive move.

While we reject the appeal of the NH bondholders, acceptance or rejection of the terms and conditions on behalf of the NH remains to be determined. The bondholders' objections may be registered and adjudicated in the reorganization court or upon judicial review as provided by law. Furthermore, as noted above, the Commission has retained jurisdiction to make further appropriate orders, if necessary, and has provided both that inclusion of NH in Penn-Central and the making of the loan arrangement on such terms as are prescribed by the Commission, are conditions of approval of the merger.

We affirm the District Court's dismissal of the appeals in No. 830 and No. 831.

D. OBJECTIONS BASED ON THE PROVISIONS MADE FOR THE PROTECTED ROADS.

The N & W and roads associated with its position (the Chesapeake & Ohio (C & O), Baltimore & Ohio (B & O), and Western Maryland) have filed an appeal (No. 778). In brief and upon argument they stated that they do not object to the Penn-Central merger itself. Their stated position is that they oppose "immediate consummation"—that is prior to the actual inclusion of E–L, D & H, and B & M in the N & W. They also assail the specific operation and effect of the protective conditions and urge modifications thereof, and attack the basic legality of the conditions as a revenue pool.

The assailed protective provisions appear as Appendix G to the Commission's order in the merger case. They

are essentially of two types: traffic conditions that require the merged Penn-Central not to change routes, rates, or service in such a way as to divert traffic from the protected lines; and revenue indemnity conditions establishing a formula whereby Penn-Central is to compensate the protected lines in the event of adverse revenue results following the merger.[5] At the time the case was before us last Term, the Commission had withdrawn the revenue indemnity conditions pending further consideration. After our remand, the Commission further considered all the conditions, amended them in some respects not here material, and restored the revenue indemnity conditions. None of the protected roads has lodged objections against these provisions, nor has Penn-Central, and we affirm the District Court's conclusion that they appear to provide adequate interim protection for the three roads in conformity with the purposes insisted upon by the Commission and which this Court sought to ensure by its decision last Term.[6]

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[5] The formula is directed to compensation for an approximation of the revenues which may be lost by the protected lines to Penn-Central. Revenue ratios are determined by dividing the combined 1965 freight revenues of Penn and Central into the 1965 freight revenues of each of the protected lines. For any given subsequent year, the total freight revenue of the merged Penn-Central and of the protected line in question is then multiplied by that line's revenue ratio. The actual earned freight revenue of the protected line for the given year is then subtracted from the figure obtained by this multiplication. If the result is a positive figure, it is multiplied by an indemnification ratio of 50%, which yields the total amount of indemnity owed. The Commission has indicated that the indemnity conditions are to supplement the traffic conditions, not to replace them; Penn-Central is not given a choice of obeying the traffic conditions or paying liquidated damages, in the form of indemnity.

[6] E–L and D & H unsuccessfully sought from the Commission a provision for "capital loss indemnification" to be paid them by Penn-Central in the event that the price for their inclusion in N & W was reduced because of the effect of the Penn-Central merger on their

The objectors, however, attack the protective provisions on three grounds: First, they claim that the revenue indemnity provisions create a pooling agreement proscribed by § 5 (1) of the Interstate Commerce Act, 49 U. S. C. § 5 (1). Second, they say that the conditions give each of the protected lines an incentive to divert traffic to Penn-Central and vice versa. Such traffic diversion, they argue, would be at the expense of the objecting, "unprotected," lines. Third, they also assert that the shield which these provisions give the protected lines dilutes their incentive to join the N & W, permits them or some of them unfairly to "shop around" for better terms of inclusion, and may delay or abort their inclusion in the N & W.

We first address ourselves to the argument assailing the indemnity provisions as an illegal pool. As the District Court pointed out, the legislative history of § 5 (1) leads to the conclusion that the section was not intended to apply to cases such as this one, in which the putative revenue pool is not the creation of private parties but is imposed by the Commission itself as a condition to consummation of a merger. Additionally, even if we consider the section applicable in these circumstances, there is no merit to the contention that the protective conditions must be struck down. Section 5 (1) proscribes "any contract, agreement, or combination among carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof," unless the Commission finds that such pooling or division "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain com-

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traffic. Although E–L and D & H have presented an appeal (No. 832) on this issue to this Court, the appeal is contingent on our reversal of the Commission's inclusion terms or our upsetting of the protective conditions. Because we today make neither of these decisions, the appeal of E–L and D & H is dismissed.

petition." The Commission has held that, even if the conditions it established were a pooling arrangement, "this record clearly supports findings . . . that to protect these carriers clearly is in the interest of better service to the public" and "will not unduly restrain competition." 330 I. C. C., at 345, n. 8. We agree with the District Court that this finding is supported by substantial evidence in the record. The interim protection of the protected lines is, in the Commission's view and under the decision of this Court last Term, essential. These conditions have been adopted for that purpose and we see no reason on the present record to conclude that they are unlawful. In the event that actual experience reveals that the provisions operate inequitably, recourse may be had to the Commission for relief pursuant to its reserved jurisdiction, subject to judicial review.

With respect to the contention that, regardless of whether the indemnity provisions constitute a revenue pool, those provisions will induce the protected carriers and Penn-Central improperly to divert traffic to one another and thereby to injure the unprotected roads, the District Court correctly concluded that there is no basis for rejecting the Commission's findings that neither the protected roads nor Penn-Central "would have either the motive or the ability to engage in such diversion on a substantial scale." — F. Supp. —. This conclusion was reached largely because of the ability of the N & W to retaliate and the limitations imposed by economic conditions and geographic facts. The Commission included in its findings "a provision that would prohibit the protected carriers from engaging in manipulation, with sanctions if they do," 330 I. C. C., at 355, and it specifically reserved jurisdiction to reopen proceedings and modify the protective conditions "in the light of experience." The Commission has also included a general reservation of jurisdiction, under which it could

revise the protective conditions.[7] If, in light of experience, improper traffic diversions should develop or, as noted above, if these conditions should otherwise prove to be inequitable, recourse may be had to the Commission under these reservations, subject to judicial review as appropriate.[8]

N & W expresses the fear that the traffic and revenue indemnity provisions will be so attractive that the three lines or some of them will prefer to continue under their umbrella, and will not promptly accept the Commission's ticket of admission to the N & W system. The Commission's reserved power appears to be adequate to deter such conduct if and when it becomes abusive. Further, one of the protected lines, the largest of the three (E–L), already has accepted, by stockholder vote, its inclusion in N & W. The board of directors of

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[7] In establishing the protective conditions, the Commission has ordered "that the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior reports and orders of the Commission and to those orders which may be issued under section 5 (9) of the Interstate Commerce Act." See n. 11, *infra*.

[8] The "protected period" during which the conditions are to be in effect will run from the date of consummation of the merger until the date of actual "inclusion . . . of . . . [the] protected carrier in a Railway System which includes Norfolk & Western Railway Company or any successor thereto, or in the Railway System to be operated by the merged company . . . ; provided, however, that if, as to any such protected carrier, no such inclusion shall have been effected within 1 year (of) the final determination of (1) the petitions which such protected carrier now has pending for inclusion in such Railway Systems, and (2) any new or supplemental petition or petitions which such protected carrier may seasonably file for inclusion in any such Railway System then, as to that protected carrier, the protective period shall end when this Commission shall so order."

another (D & H) has recommended to stockholders that inclusion be accepted.[9] In view of these circumstances, the fears expressed by N & W and the other protestants as to the dangers which perpetuation of these provisions will pose must be regarded as speculative. Clearly, if one or more of the protected roads should decline to accept the terms for inclusion specified by the Commission's order, the Commission could be called upon to examine, pursuant to its reserved power, the appropriate action to be taken to terminate or modify the interim protective provisions or otherwise to ensure that the shield supplied to the roads is not converted into a sword. The fears expressed by the protestors fall far short of furnishing a reason for rejecting the District Court's approval of the Commission's order that the Penn-Central merger be immediately consummated. Nor is there merit to N & W's contention that it was error for the Commission to fail to rule, now and forever, that the protected roads may not be included in Penn-Central. Whether or not such permission appears likely, there is no occasion for such contingent foreclosure.

Finally, we reject the contention that this Court's prior opinion in this matter now forbids us from permitting consummation of the merger until actual inclusion of the three roads in a larger system. With respect to the inclusion problem, our criticism of the original Commission order ran to the ICC's failure to decide the question over which it had undoubted jurisdiction and which

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[9] N & W places emphasis on a letter written to stockholders by the President of D & H, who is a director and a large stockholder, to the effect that he is formulating an alternative proposal to inclusion in the N & W. But at oral argument counsel for D & H reiterated that road's desire that this Court affirm the inclusion order and the merger judgment, and there is no basis in the record before us for concluding that the D & H board of directors has changed its position.

the Commission itself had found to be important to the public interest: the determination, so far as the Commission was empowered, of the ultimate home of the three roads. As this Court said: "we can only conclude that it is necessary that the [Commission's] decision as to the future of the protected railroads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger." 386 U. S., at 390. Our decision was not intended to require an indeterminate delay in the consummation of the merger, pending the resolution of the jockeying, negotiating, and fighting among all of the parties concerned and completion of the multitudinous procedures necessarily involved. This would place the public interest as well as the vast majority of the affected private interests at the mercy of decisions not merely of certain corporations whose interests are, in fact, secondary or derivative, but of classes of security holders. It was our intention that the public interest should be served with fairness to all private parties concerned, not that it should be the captive of parties some of whom are understandably engaged in maneuvering solely for the purpose of improving their competitive, strategic, or negotiating positions.

There is no provision of law by which the Commission or the courts may compel the three protected roads to accept inclusion in the N & W, as ordered by the Commission, or in any other system: Section 5 (2)(d) of the act provides:

> "The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads request-

ing such inclusion, and upon a finding that such inclusion is consistent with the public interest."

It does not make provision for compelling an unwilling railroad which is not itself a party to a merger agreement to accept inclusion under the terms the Commission prescribes. Our opinion on the first appeals commanded the Commission to specify the opportunity provided for the smaller roads to be included in a major system, before approving consummation of the Penn-Central merger. It was not intended to give the protected corporations or the creditors or stockholders of each of them, or the N & W relying on their position, a veto over the public interest which the Commission has found to inhere in this merger.

We need not pause to discuss in detail N & W's contention that the Commission's findings do not support a conclusion that N & W must proceed with inclusion of fewer than all three of the protected roads, if, for example, B & M does not accept the terms. The original decision in the N & W-Nickel Plate merger proceedings clearly contemplates action by the Commission upon a "petition or petitions" of one or more of the three roads. 324 I. C. C. 1, 148. Separate petitions were in fact filed by each of these roads. As the District Court concluded, in light of the favorable action already taken by E–L stockholders and the D & H Board of Directors, the possibility of noninclusion of B & M would not be cause for setting aside the Commission's order.[10]

[10] The remaining arguments by appellants in No. 778 may be briefly noted and answered. There is no substance to appellants' contention that the Commission failed to find that the consummation of the merger under the protective conditions would be in the public interest. As the District Court concluded, this finding is "implicit in the very concept of devising conditions permitting consummation prior to actual inclusion of the protected roads in a major system

E. THE POSITION OF READING CO.

No. 834 is an appeal on behalf of the Reading Railroad. Reading does not ask that the consummation of the merger be stayed. Its complaint is directed to the District Court's affirmance of the Commission's refusal to permit Reading to reopen the record and submit evidence in support of its claim that it should receive protective conditions similar to those the three "protected roads" were given in Appendix G to the merger order.

Reading is controlled by the C & O–B & O system through stock ownership. It has been suggested under the so-called Dereco plan, that the proposed N & W–C & O merger should include the Reading, as well as certain other small roads. Reading did not and does not ask for inclusion in Penn-Central, or for inclusion at this time in N & W along with E–L, D & H, and B & M. It did not offer evidence in the Penn-Central proceedings as to possible traffic diversion, until its tender made after the record had been closed. It now claims, however, that since much of its trackage is paralleled by lines of the Pennsylvania, it will be injured by the merger and should have the benefit of the Appendix G provisions.

Reading requests that we remand its case to the Commission for a decision as to whether protective conditions should be established for it. The Commission found, in its original report, that Reading would not be harmed

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and was made explicit when the Commission said that only 'some of the merger benefits' would be prevented and that the conditions would not work 'an undue hardship upon applicants either in their operations or merger implementation.' 327 I. C. C., at 532; see also 330 I. C. C., at 361. To deny evidentiary basis for this finding would defy common sense." — F. Supp. — (1967). And appellants' attack upon the District Court's opinion on the basis of *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947), totally misconceives the limited office of that decision. See n. 14, *infra*.

by the merger and that protective conditions were therefore unnecessary. This finding was based in part on a letter submitted by Reading itself to the Commonwealth of Pennsylvania and introduced, without objection from Reading, in evidence before the Commission. Only after the Commission issued its report did Reading object to the finding of no adverse impact upon it as result of the merger, and then Reading's fear appears to have been chiefly that a finding of no adverse impact might prejudice its eventual attempt to join in the N & W–C & O merger. The Commission held Reading to its "original concession that the effect of the merger transaction (without the indemnity conditions) upon them would be inconsequential." 330 I. C. C. 328, 357. In response to Reading's specific concern, the Commission modified its finding of no adverse impact to a finding that no adverse impact had been shown. The District Court upheld this decision and, in addition, concluded that Reading's claim of substantial adverse impact as a result of the Penn-Central merger was unpersuasive on the merits.

Ordinarily, we would, without more, concur with the District Court's view. Because of the vastness and complexity of this matter, however, and in order to ensure that whatever substance there may be to Reading's claim is not sacrificed, we sustain the Commission's denial of Reading's submission on condition that it is without prejudice to any proceeding which Reading may hereafter institute, based on actual experience, for relief from undue prejudice caused by the merger.

II. Inclusion Decision.

Three appeals, No. 779, No. 833, and No. 836, relate to the Commission's order, entered in the N & W-Nickel Plate merger proceedings, prescribing that N & W accept inclusion of the D & H, B & M, and E–L in the N & W system and specifying the terms thereof. *Norfolk &*

Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Merger, etc., 324 I. C. C. 1 (1964), supplemented, 339 I. C. C. 780, reconsidered, 331 I. C. C. 22 (1967). In 1964 the Commission approved the N & W-Nickel Plate merger subject, among other conditions, to the Commission's retention of jurisdiction for five years to permit the filing of petitions by E–L, D & H, and B & M for inclusion in the N & W system. The Commission's approval was also subject to the condition that N & W give its irrevocable consent to inclusion of the three roads on terms that the ICC would itself prescribe in the absence of agreement among the affected parties. 324 I. C. C. 1, 148. The three lines in due course filed petitions for inclusion. Hearings were held, and, on June 9, 1967, following our remand in the Penn-Central merger case, the Commission made findings and entered its order requiring N & W to include the three roads in its system under terms it prescribed.

Appellants are the N & W, the B & M, and a number of E–L bondholders. As we shall discuss, only the N & W appeal raises issues which go broadly to the merits of the Commission's order implementing N & W's duty to accept inclusion of the three roads. B & M seeks remand on the grounds that the terms fixed by the Commission for N & W's offer to acquire the stock of the B & M are inadequate to reflect B & M's value as part of the N & W system. The third appeal, brought by E–L bondholders, turns on the question whether the Commission should have specifically retained jurisdiction to protect the E–L bondholders in the event that N & W attempts after inclusion improperly to divert E–L traffic to itself. We affirm the District Court's action in disallowing the claims of all of these appellants. Reference is made to preceding sections of this opinion for discussion of the bearing of claims respecting the inclusion order upon the Penn-Central proceeding.

We first address ourselves to the demands of E–L bondholders for assurance that the reservation of jurisdiction by the Commission would enable them to obtain consideration of unwarranted traffic diversion by N & W, if that should develop. Since N & W will be acquiring stock control of E–L and E–L's bondholders will look to E–L's fortunes for payment and security, the bondholders fear that N & W may not be entirely solicitous of E–L's welfare. Appellants themselves note that the Commission, in adopting the report and order of the officer presiding over the original hearing, has reserved jurisdiction "to receive petitions, institute such investigations, and make such orders to accomplish the objectives and purposes of the plan for inclusion and other terms and conditions prescribed herein . . . ." The Commission has also retained jurisdiction "for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under which jurisdiction is expressly retained in the prior report and order and in [the] supplemental report of the Commission and to those orders which may be issued under section 5 (9) of the Interstate Commerce Act." [11] Supplemental Order issued June 9, 1967. We have no doubt that if, after inclusion of E–L, N & W should engage in a course of conduct which invades the rights of E–L bondholders, the bondholders may apply to the Commission for relief and the Commission's reservation of jurisdiction will enable it to rule upon this complaint and to grant relief, if warranted, subject to judicial review.

The other two appeals require somewhat more extended comment. We first note that our opinion at the

[11] Section 5 (9) provides that "the Commission may from time to time for good cause shown make such orders supplemental to any order made (under its power to authorize railroad consolidations) . . . as it may deem necessary and proper."

last Term found adequate support for the Commission's conclusion that the public interest requires inclusion of the three roads in a larger system. As we have previously noted, see pp. 13–14, *supra*, the Commission's findings and order with respect to the "public interest considerations" involved in the inclusion of these lines in the N & W system are in conformity with the statute and are supported by substantial evidence.

The attack of N & W and B & M upon the Commission's order centers, not upon the fundamental issues, but upon the particular terms of that order. In brief, the Commission has provided that N & W will purchase stock control of E–L and B & M through wholly owned subsidiaries. It has fixed the basis for such purchase in relation to the experienced income of the lines, their earnings having been adjusted for various factors including savings and gains which the Commission found would result from inclusion in the N & W system. The Commission has satisfied itself that traffic losses to the merged Penn-Central would be offset by benefits to N & W not otherwise taken into account. The shareholders of these roads are to receive stock of a newly created subsidiary of N & W, which will eventually be convertible into N & W common stock. In the case of D & H, the means of valuation was the same as for the other protected lines, but N & W is to pay for D & H assets either in cash or with a note and N & W stock.

This is the first time in the Commission's history that it has undertaken to "replace the bargaining session." It did so here pursuant to the N & W stipulation, which was accepted by N & W as a condition to the N & W-Nickel Plate merger, and in response to the exigencies of the situation emphasized by this Court's decision at our last Term.

As we have noted above, the E–L stockholders have voted approval of the inclusion terms. The D & H board

of directors has recommended approval to its stockholders. N & W complains that the price set for inclusion of the three lines is too high and that some other aspects of inclusion are arbitrary. B & M, on the other hand, complains that the price set for its inclusion is too low. The District Court affirmed the Commission's findings and conclusions, and in the exercise of our reviewing function we find no basis for reversing that court's decision.

The method for determining the value and exchange ratio which the Commission adopted, and which we have briefly described, is not attacked. It is a method that is reasonably conventional and generally accepted, always subject to the modifications and adaptations required by individual cases, and we see no basis for holding it erroneous as a matter of law. The attack that is launched is upon factors of particularized judgment and the weight to be ascribed to various values. These are matters as to which reasonable men may reasonably differ in detail, and we see no basis for setting aside the Commission's conclusions as sustained by the District Court. In setting inclusion terms, the Commission was dealing with complicated and elusive predictions about probable traffic patterns following the Penn-Central merger and the inclusion decision. We are no more competent than the Commission and the District Court to ascertain the accuracy of those predictions. We deem it our function, in the complexities of a case such as this one, to review the judgment of the District Court with respect to agency actions to make certain that those actions are based upon substantial evidence and to guard against the possibility of gross error or unfairness. If we find those conclusions to be equitable and rational, it is not for us to second-guess each step in the Commission's process of deliberation.

N & W's attack upon the inclusion order centers upon its disagreement with the Commission's findings as to prospective earnings of the three roads as part of the N & W system. It argues that the Commission had no basis for concluding that the earnings of E–L, D & H, and B & M, as subsidiaries of N & W, would be adequate to assure their "viability." [12] It asserts that the Commission has made various invalid adjustments of actual earnings and failed to make others. This, N & W says, is "the principal area of dispute in these proceedings."

On the other hand, the B & M contends that the Commission's findings substantially underestimate the savings which should be credited to it as an earnings adjustment, and that, therefore, the terms for its inclusion are unjust. Specifically, it urges that the Commission underestimated the probable amount of savings resulting from N & W control and the coordination of operations and equipment repair facilities and reduction of administrative expenses. The Commission, however, accepted and relied on figures submitted by B & M's own witness. B & M now assails these figures, but obviously the Commission was entitled to rely upon them.

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[12] N & W contends that, for this reason, the Commission should have considered alternatives to inclusion as possible means of saving the service of the protected lines. We believe N & W is considerably embarrassed, in making these arguments, by the fact that the Commission has contemplated inclusion of the protected lines in N & W ever since 1964, when N & W was permitted to consummate its highly successful merger with the Nickel Plate, and when N & W consented in principle to the inclusion of the three roads in N & W. The protected lines were scarcely faring better in 1964 than they are now. Despite the Commission's recognition that these lines are "weak," it has found that their inclusion in N & W to be in the public interest.

The District Court examined in some detail the contentions of the parties attacking the financial terms of the inclusion order. We have reviewed the findings of the Commission in light of the evidence of record and the District Court's analysis, and we find no basis for reversing the District Court's judgment. The terms fixed by the Commission are clearly within the area of fairness and equity. Although B & M argues forcefully that the Commission underestimated the savings that should redound to its credit, we cannot say in the circumstances that the order should be reversed and remanded in this respect. It must be noted, as we have discussed in connection with appeals relating to the Penn-Central merger decision, that the inclusion order has no compulsive or coercive effect upon the roads to be included. Unless and until modified by the Commission, it remains available to the protected lines upon the terms which it specifies and which the District Court found to be fair and equitable.[13]

Only one other point of the N & W attack upon the inclusion order requires comment. N & W objects to the conditions prescribed by the Commission to protect the interests of the employees affected by the order. We note that those conditions, protecting employees of the protected lines, are the same as the conditions set by the Commission for N & W's employees at the time of the N & W-Nickel Plate Merger. As the District Court held, "the Commission acted within its powers in requiring N & W to protect employees of the three roads as

[13] There is no substance to N & W's argument that the Commission failed to consider the possiblity that one or more of the protected lines would not join N & W. The Commission plainly did consider this possibility. It was not required to set a scale of terms for inclusion depending on the various hypothetical consequences of its order.

thoroughly as those of the roads it was permitted to absorb only on the condition that it would accept these lines if the Commission so directed." — F. Supp. —.[14]

III. Conclusion.

The judgment of the District Court for the Southern District of New York is affirmed, subject to the modifications and conditions stated in this opinion. Nos. 778, 779, 830–836 are remanded to that court for the entry of such orders and for such further action as may be consistent with our opinion and judgment herein and as may be appropriate with respect to the exercise of that court's jurisdiction in the premises.

The applications of Scranton, Shapp, and Moosic for mandamus or certiorari (Nos. 663 and 664, Misc.) are denied without prejudice to further proceedings in the

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[14] We reject N & W's argument that the District Court was guilty of a violation of the rule of *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947). N & W attempts to extend the principle of that case far beyond its limits. But even if we were to accept N & W's construction of the case, N & W's conclusion would not follow. N & W relies on a statement by the District Court to the effect that "our discussion has revealed many ways by which, in our view, the Commission could support terms as favorable as it has established even if the Court should have held some of its subsidiary findings to be insufficient." — F. Supp. —. But that statement does not indicate that the court was basing its affirmance of the Commission on grounds other than those relied on by the Commission itself. On the contrary, the District Court appears to have agreed in substance with all the major findings of the Commission. To the Commission's analysis it added several points that it believed would *also* support the Commission's conclusions. The ultimate terms for inclusion were, of necessity, approximations based on the probable value of the protected lines to N & W. The District Court found that these values had been properly computed but that, even if they were not, N & W was protected by several adjustments that had been made by the Commission in order to ensure that inclusion was fair to N & W.

District Court for the Middle District of Pennsylvania, consistent with this opinion.

In No. 433, jurisdiction is noted, the judgment of the Middle District of Pennsylvania with respect to Pottsville is vacated, and the cause is remanded to that court for further proceedings in light of our decision today.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CITY OF POTTSVILLE *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

BOROUGH OF MOOSIC *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

CITY OF SCRANTON ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Nos. 433, 663 Misc., and 664 Misc. Decided January 15, 1968.

MR. JUSTICE DOUGLAS, dissenting in part.

In my opinion, these cases present important questions concerning the "public interest" which I feel the Commission should be required to answer before judicial review can be feasible.

The Pennsylvania proceedings were initiated by the Borough of Moosic (petitioner in No. 663 Misc.), located in Lackawanna County, Pennsylvania. The Borough brought its action on June 26, 1967, to annul and set aside the orders of the Commission authorizing the Penn-Central merger and requiring the inclusion of E–L, D & H, and B & M in the N & W system.[1] Those orders

[1] The Borough of Moosic was a party to the *N & W Inclusion* case before the Commission, in which it offered testimony and sub-

by the Commission had been issued on June 9, 1967, following our remand last Term on March 27, 1967. *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372. Moosic, whose complaint is dated June 26, 1967, was joined by intervenors City of Scranton and Milton J. Shapp (petitioners in No. 664 Misc.)[2] and the City of

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mitted exceptions. It was not, however, a party before the Commission in the *Penn-Central Merger* case, reviewed by this Court last Term. Moosic, however, seeks to challenge the merger order in the Pennsylvania action. Since Moosic is served only by E–L and D & H, the Borough notes that it became concerned with the proposed Penn-Central merger only after it learned that the merger was in part responsible for the petitions of E–L and D & H for inclusion into N & W.

[2] The City of Scranton and Milton J. Shapp were parties to both proceedings before the Commission, and were intervenors in the previous action commenced in the Southern District of New York, which was reviewed by this Court last Term. They were the only parties before the New York court last Term that challenged the basic validity of the Penn-Central merger. (See *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372, 462 (dissenting opinion of Mr. Justice Fortas).) Their original complaint in the New York court was dismissed with prejudice by that court on October 19, 1967, pursuant to Rule 41 (b), F. R. C. P., for failure to file a supplemental complaint attacking the Commission's order of June 9, 1967, in the *Penn-Central Merger* case. Scranton and Shapp were never parties to the *N & W Inclusion* case in the New York court.

Milton J. Shapp is a stockholder of the Pennsylvania Railroad Company, and a citizen of Pennsylvania. The City of Scranton is served by E–L, D & H and the Central Railroad of New Jersey. The city's interest stems both from the fact that the Penn-Central merger has necessitated the inclusion of E–L and D & H into N & W, thus making Scranton a two-railroad town, and from its fears that the proposed N & W–C & O merger will be approved along with the inclusion of CNJ therein, which would reduce Scranton to a one-railroad town. Since Scranton is a part of the Scranton-Wilkes Barre industrial and distribution complex of northeastern Pennsylvania, it also has an interest in the other railroads serving that economic area—Reading Company, Lehigh Valley, and the Pennsylvania Railroad, together with their switching lines. The city and

Pottsville (petitioner in No. 433).[3] On July 11, the court granted the applications of Shapp and the City of Scranton to intervene, but denied that of the City of Pottsville.

Before the Pennsylvania action was initiated, the District Court for the Southern District of New York, in which the original action to set aside the Commission's order allowing consummation of the Penn-Central merger had been filed (*i. e.*, the action reviewed by this Court last Term), was asked to enjoin consummation of the merger authorized by the Commission's June 9 order until the validity of the *Inclusion Order* had been finally determined. On July 3 the New York court temporarily enjoined the merger, and ordered all plaintiffs and intervening plaintiffs in the original action to file supplemental complaints by July 17, attacking the June 9, 1967, order of the Commission in the *Penn-Central Merger* case, or be dismissed with prejudice.

Also before the Pennsylvania action was filed, N & W (on June 13) filed an action in a federal district court in Virginia to set aside the inclusion order; and on June 23, D & H filed a similar action in the Southern District of New York. Other interested parties had apparently indicated that they were contemplating filing additional actions in still other district courts, and the Government and the Commission urged all parties to present their challenges to the original District Court in New York. In a hearing before that court on June 28, two days after the filing of Moosic's complaint in Pennsylvania, it was stated that no objections to venue would be interposed by the Government against any party choosing to litigate in the New York forum. Thereafter, the United States

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its surrounding area is one of the most important centers of railroad activity in the Eastern District.

[3] City of Pottsville was a party to the Commission proceedings involving the Penn-Central merger. The city is a municipal corporation located in Schuylkill County, Pennsylvania, and is served by the Reading Company and the Pennsylvania Railroad Company.

and the Commission moved in the Virginia and Pennsylvania courts to stay proceedings pending the final determination of the New York actions. The Virginia court continued its proceedings until after the decision of the New York court should become available to it. The Pennsylvania court issued a stay until October 1, 1967.

Upon failing twice to have the stay order dissolved by the Pennsylvania court, the Borough of Moosic and Shapp and the City of Scranton petitioned this Court to vacate the stay order and command the District Court to proceed with their complaints. The Court today dismisses those two petitions.[4]

The three communities involved—the Borough of Moosic and the cities of Scranton and Pottsville, make a broadside attack on many aspects of the merger in their actions in the Pennsylvania court. Among those many issues tendered is at least one that has never been considered by any court, namely, whether the inclusion of E–L, D & H, and B & M into N & W would have such a serious detrimental impact on their communities—in terms of services, employment, and business—as to make their inclusion against the "public interest" within the meaning of the Act. The communities also contend that they have not been afforded an adequate opportunity to present their arguments to the Commission.

[4] Pottsville (No. 433) seeks review of the order of the Pennsylvania court denying its application for intervention in the *Moosic* case on the ground that the city was not located in the Middle District of Pennsylvania and "the defendant has objected to parties raising their objections to these I. C. C. Orders other than in the Southern District of New York. . . ." The Government, however, has no objection to the intervention of Pottsville below, and concedes that the court was in error in assuming that the Government's desire to have all actions challenging the Commission's orders brought in the New York court constituted an objection to Pottsville's formally becoming a party in the *Moosic* case. I therefore concur with the Court and agree to vacate the order denying Pottsville's application for leave to intervene and to remand to the District Court where Pottsville may renew its application.

This Court quotes the conclusion of the Commission that, "The contentions regarding the adverse effect of the merger on Pennsylvania's economy are not substantiated by the evidence. On this record, the prospects clearly import that the merger will benefit rather than harm the Commonwealth." This statement, however, is taken from an earlier (April 6, 1966) opinion by the Commission in the merger case. *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, Finance Docket No. 21989, 327 I. C. C. 475, 492. In other words, the Commission was there directing its attention to the effects which the merger of the Penn and Central railroads itself would have on various Pennsylvania communities. It was not concerned with the community impact of the *inclusion of E–L, D & H, and B & M into the N & W system.* That issue was not then even before the Commission, but was presented only at a later date in the separately docketed *N & W Inclusion* case, in which the Commission issued its order on June 9, 1967. *Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Merger, etc.*, Finance Docket No. 21510, 330 I. C. C. 780.

The Court seems to suggest that because the Commission in its April 6, 1966, order also contemplated that E–L, D & H, and B & M would eventually be included in some major system, it must have been taking into account the impact of such inclusion on the communities served by those roads when it made the statement quoted above. But this assumption flies in the face of the Commission's case-by-case approach. It ignores the fact that the evidence before the Commission in Finance Docket No. 21989 (the *Penn-Central Merger Case*) relating to the community impact of the Penn-Central merger was not addressed to the impact which the eventual inclusion of E–L, D & H, and B & M into N & W would have on communities served by those roads. See Recommended Report, Finance Docket No. 21989, at 229–286; 327 I. C. C. 475, 489–493. And if the Court were correct in

divining the Commission's hidden intent, I would have no doubt that the Commission did not provide adequate opportunity to the communities who would be affected by the inclusion of the three roads in any major system to participate in the proceedings. *Post*, at —.

Congress has, of course, committed all questions of policy under § 5 to the Commission; but on judicial review, we must be able to say that the Commission has made the necessary findings in determining policy—in this instance, that the inclusion will be in the "public interest." I do not find in the opinion of the District Court, or in the Court's opinion, a searching inquiry into the Commission's conclusions regarding the community impact of its orders in the *Inclusion Case* to ascertain whether they are adequately supported by "basic or essential findings." *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489. A few words about the community impact of this case—the *Inclusion Case*—will point up what I mean.

In the Recommended Report of Commissioner Webb, served on December 22, 1966, in the *Inclusion Case*, scant attention was paid to the issues tendered by the community interests. Commissioner Webb noted that many representatives of various shipper and community interests testified concerning the vital need for the services of the three roads. He then disposed of the assertions of Milton J. Shapp and certain Pennsylvania interests in one sentence:

> "Contrary to the assertions of Shapp and other Pennsylvania interests, intramodal competition would not be significantly lessened."

An accompanying footnote reads:

> "Shapp's contentions that competition would be substantially curtailed and that rail facilities in the eastern and western portions of Pennsylvania would

be contracted are predicated on the merger of both E–L and D & H into N & W. However, the merger of E–L into N & W is not authorized herein [only control was authorized]. Moosic submitted testimony through its Mayor and Northampton through the Chairman of its Board of Commissioners, in which opinions were expressed that inclusion of E–L and D & H in the N & W system would be injurious to shippers and receivers and the economies of their areas. No evidence was offered to support these opinions and they are not sustained by any other evidence in the record."

This cursory treatment of the allegations of Shapp and other Pennsylvania interests is not an analysis of the merits of their assertions sufficient for judicial review. This is hardly a considered treatment of the effects which inclusion would have on communities presently served by more than one of the roads to be included into the N & W system.[5]

The parties in the Pennsylvania court argue that the Hearing Examiner and Commission failed to relate the various pieces of evidence which were available concerning the community impact of any reduction in services or facilities likely to result from the *Inclusion Order* in the communities involved. In particular, the parties note that Moosic would be a prime candidate for the pruning of facilities since it has a substantial amount of E–L and D & H track, and that Scranton would be reduced to a two-railroad town with E–L and D & H also having duplicating facilities in the area. It was noted that even though the Commission stated that its *Inclusion Order* did not authorize the abandonment of facilities, the evidence introduced by E–L in support of

[5] This brusque treatment of the community allegations contrasts sharply with the lengthy discussion of certain community interest aspects of the Penn-Central merger found in the Recommended Report in Finance Docket No. 21989, at 229–286.

inclusion demonstrated clearly that the avowed purpose underlying the entire transaction was substantially to reduce facilities in the Wilkes Barre-Scranton-Binghamton area, and thereby effect economies. It was further alleged that according to E–L's own plan presented to the Commission, inclusion of E–L and D & H into N & W would lead to the tearing up of the main line-double track between Binghamton and Scranton, and would thus take Scranton off the main line between Chicago and New York.

The communities also contend that their opportunity to participate meaningfully in the *Inclusion* proceedings was seriously limited: the Commission and its Hearing Examiner denied all requests by Moosic to hold hearings in the Scranton area so that its citizens, businessmen, and civic leaders could be heard concerning the railroad proposals. And the City of Scranton describes the difficulty of meaningful participation by community interests in the following manner:

> "The April 6, 1966 report of the Commission in the *PRR–NYC Merger Case* stated that its decision is related to the 'inclusion' proceeding, F. D. 21510, whereby E–L, D & H and B & M seek to be absorbed by N & W. The Commission stated that it took official notice of F. D. 21510 *and that it had a bearing on its decision.* [327 I. C. C. 475, 487–489.] Yet the fact was that the Commission, on April 6, 1966, did not and could not have considered the evidence of the nonrailroad parties to F. D. 21510, because such evidence from the nonrailroad parties was not circulated until April 13, 1966, and was not received in evidence prior to June 16, 1966. The Commission could not in its April 6, 1966 report have considered the public interest aspects of the inclusion case, but could only have based its PRR–NYC decision in this regard strictly upon consideration of railroad evidence, railroad positions, and railroad arguments."

It is not at all clear to me that the Commission offered a meaningful opportunity in the *Inclusion Case* to local and regional interests to present their arguments. That is a matter for the Pennsylvania court to determine in this *Inclusion Case*.

As respects the question of "public interest" in the *N & W Inclusion Case*, the Commission concluded:

> "On the positive side, inclusion of the petitioners in N & W will strengthen railroad competition, enhance the adequacy of the transportation service provided by N & W as well as the three petitioners by opening new routes and instituting new service, produce the economies and efficiencies inherent in single-line operation, and permit the joint use where possible, of facilities, equipment and routes.
>
> . . . . .
>
> "Our order herein does not authorize the abandonment of lines, operations or facilities by N & W or the petitioners. Applications for such abandonments are to be filed in appropriate proceedings. We expect N & W to maintain proper divisions with the petitioners." 330 I. C. C. 780, 827.

Despite the Commission's disclaimer that the inclusion order "does not authorize the abandonment of lines, operations or facilities," it appears that some abandonment will almost certainly result given the geographical location of the lines of the four roads involved and the companies' desire for efficiency. In addition, the Commission itself, in the first paragraph quoted above, indicates that it contemplates "economies and efficiencies inherent in single-line operation," and "the joint use where possible, of facilities, equipment and routes"—all of which portend significant effects on the local communities stretched along the routes of the roads. Deferral of the question of community interests until a subsequent hearing on abandonments will not ensure adequate protection of those interests; for at the subse-

quent hearing the Penn-Central merger would be a fact, and the pressures would be great for increased economies on the part of the N & W system to make it a more efficient competitor of Penn-Central.

Communities which depend heavily on the railroad industry for employment, such as the City of Scranton, would be affected significantly by any loss of jobs. In its opinion in the *N & W Inclusion Case*, the Commission noted that in the earlier phase of this proceeding, N & W had entered into agreements with certain labor unions which provided that elimination of jobs resulting from the N & W-Nickel Plate unification would be accomplished only through normal attrition (*i. e.*, "principally by death, retirement, discharge for cause, or resignation." 330 I. C. C. 780, 822, n. 4); the agreements were apparently modified at a later date to prohibit transfer of employees to other jobs beyond their general locality. For those employees not covered by the agreements, the Commission imposed certain protective conditions prescribed in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I. C. C. 557, as supplemented and clarified in 317 I. C. C. 729 and 320 I. C. C. 377. The Commission concluded that the employees of E–L, D & H, and B & M should be protected in the same manner as their counterparts involved in the N & W-Nickel Plate proceedings. For all employees not covered by attrition agreements, the protection would consist of the following: either N & W's existing agreements had to be modified to include employees of the included roads or similar new agreements were to be drafted; and, if no agreement was concluded within 60 days, the Commission would impose appropriate conditions. The Commission denied the requests of D & H and B & M to extend this employee protection to their supervisory, professional, and executive personnel.

Whether the use of attrition agreements to eliminate jobs has a substantial adverse impact simply because jobs are eliminated is a question not free of doubt.

The Commission outlined the importance of the service of the three protected roads to the public, but limited this to a showing that, as a geographical matter, the lines of all three roads supplied needed services. 330 I. C. C. 780, 793–794. As far as appears from its decision, the Commission did not consider the unfavorable impact on the communities now served by more than one of the protected roads when the three roads are put into a single system.

Under a heading in its opinion entitled "Advantages to petitioners and to the public," the Commission noted that under N & W control, the three protected roads could achieve substantial savings; and it observed further that:

> "The petitioners as well as the public will benefit from the unified management of what is now several separate companies operating independently. Among others, such benefits will include joint routes of affiliated lines, the prospect of single-line service, elimination of interchanges, improved schedules, and a more flexible distribution of equipment. Such benefits will increase the petitioners' ability to preserve and improve their present services and meet the needs of the shipping public. Through expanded piggyback operations, petitioners will be in a better position to meet the competition of motor carriers. Because many industries prefer to locate plants where a single-line through-route service will be available, more opportunities for industrial development will be created. As part of the large N & W system, the use of more modern equipment and facilities will be justified, resulting in greater efficiency, improved operations and better service to the public." 330 I. C. C. 780, 795.

These general conclusions are not addressed to the objections made by the communities affected. Moreover, the Commission's references to "joint routes,"

"elimination of interchanges," and a "more flexible distribution of equipment," suggests that community fears of eventual abandonment or scaling down of facilities are well founded.

The issues tendered by the parties in the Pennsylvania court, touching on the questions just described, are substantial and are not now before this Court for review. They have not been briefed or argued; and I fail to understand how the Court can presume to decide them.

The Court suggests that the community interests involved can obtain adequate protection from possible curtailment of service by asserting their challenges "in appropriate proceedings when such curtailment is specifically proposed." Yet it seems clear that postponing review of this question until a subsequent proceeding on proposed abandonments will not protect the communities adequately. The inclusion of the three protected roads into the N & W system surely portends significant curtailment and rerouting of the facilities of one or more of the four roads involved. Once the Penn-Central merger is consummated, N & W and its three included roads will face competitive injury unless their operations are streamlined and economized. The interests of the communities stretched along the routes of E–L, D & H, B & M, and N & W might well weigh less against the threat of Penn-Central competition once the merger has been consummated than those interests would if they were considered and evaluated before actual competition from a merged Penn-Central system is felt.

I do not suggest that we can now decide whether the impact on community interests justifies disapproval by the Commission of the inclusion of the three protected roads into N & W. The question of the adequacy of the Commission's findings on this point has not been presented either to this Court or to the New York District Court; and as pointed out previously, I have grave doubts that the Commission's opinion in the *Inclusion Case* contains

adequate findings on the issue to permit responsible judicial review.

The cases presently pending in Pennsylvania present, *inter alia*, the question whether the Commission failed to evaluate the adverse impact of the inclusion of the E–L, D & H, and B & M into the N & W system upon the communities served by the involved carriers.

In the action before the New York District Court, here for review in Nos. 778 and 779, that court dismissed Shapp and the City of Scranton, with prejudice, for failing to file supplemental complaints attacking the Commission's June 9, 1967, order in the *Penn-Central Merger Case*. But the complaints of Shapp and Scranton that were dismissed with prejudice dealt only with the merits of the Commission's approval of the Penn-Central merger in its April 1966 decision in Finance Docket No. 21989. They did not attack the Commission's later (June 9, 1967) order in the separately docketed *Inclusion* proceedings. Thus, there is no question of *res judicata* present with regard to those parts of Shapp's and Scranton's complaint in the Pennsylvania court which attack the Commission's June 9 order in the *Inclusion Case*. And, of course, no question of *res judicata* arises with respect to the complaints of Moosic and Pottsville. Even if the *Penn-Central Merger* and *N & W Inclusion* cases are regarded as inseparable, it is clear that the community impact aspect of the *Inclusion Case* was not considered by the New York court. It is evident from the record and that court's opinion that the primary concern of the court related to various aspects of the merger and inclusion orders tendered by the railroad parties which were unrelated to at least some of the attacks leveled by the parties in the Middle District of Pennsylvania, including the question of community impact.[6]

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[6] With respect to the *N & W Inclusion* action, the court below noted that only "two points come even close to the larger public interest in the transaction. . . ." Those points were: first, N & W's

The Court seemingly declares, however, a new rule of *res judicata* in its effort to prevent the parties in Pennsylvania from proceeding with their actions challenging the basic validity of the Commission's *Inclusion Order* on the ground, *inter alia*, that the Commission has not made adequate findings on the issue of the community impact of that order. Because the Borough of Moosic, which had properly filed a suit in the Middle District of Pennsylvania but saw its action stayed, refused to accept the invitation of the New York District Court (a court in which Moosic was never a party, and which neither assumed jurisdiction over Moosic or attempted to do so by making it an involuntary plaintiff) to come to New York and litigate, the Court holds that Moosic is bound

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complaint that the Commission should have considered the desirability of including the three protected roads along with the Reading Co. and the Central of New Jersey as wholly owned subsidiaries, not in the N & W system, but in the proposed N & W–B & O–C & O system; and second, N & W's assertion that the Commission erred in failing to find that inclusion of any of the three protected roads in the Penn-Central system rather than the N & W system would not be in the public interest. N & W has pursued the latter argument in this Court, asserting that by failing to make the suggested finding the Commission has left open the possibility that one or more of the three protected roads can eventually obtain inclusion in the merged Penn-Central system if inclusion in the N & W system is not voted by shareholders. The court rejected both of these contentions, holding that the Commission was not required to inject the N & W–B & O–C & O proposal into the instant proceeding or to make the negative finding requested by N & W to preclude the possibility of eventual inclusion of one or more of the three roads in the Penn-Central system. The court directed the remainder of its opinion dealing with the *N & W Inclusion* case to examining the financial terms of the inclusion order, the employee protective conditions imposed by the Commission, the Commission's general standard for, and method of, valuation, certain attacks by E–L, D & H and B & M on matters of valuation peculiar to each road, and the possibility of non-inclusion of D & H and/or B & M in the N & W system—none of which involved the community impact problem. *Erie-Lackawanna R. Co.* v. *United States*, — F. Supp. —, — (D. C. S. D. N. Y. 1967).

by the decision of the New York court in the *Inclusion Case*. The New York court itself did not attempt to hold that its orders in the *Inclusion Case* would bind Moosic if it did not join in the New York proceedings. And I am at a loss to discover any such principle in the law of *res judicata*.

A party is entitled to its day in court;[7] and I cannot explain how a party can be deprived of that right or waive it by refusing an invitation—not even an order—to litigate in another court located in another State.[8] The Court could reach its conclusion under the doctrine of *res judicata* only if Moosic could be termed in "privity" with one of the parties litigating in the New York action. See, *e. g.*, *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322; *Bank of Kentucky* v. *Kentucky*, 207 U. S. 258; *Mutual Benefit Life Ins. Co.* v. *Tisdale*, 91 U. S. 238; *In re Howard*, 9 Wall. 175. But Scranton and Shapp were the only community interests in the New York court who challenged the Commission's basic finding that the Penn-Central merger was in the public interest; and, as pointed out, their allegations were not directed to the Commission's order in the *N & W Inclusion Case*. The Borough of Moosic is a separate community, with distinct interests based on the facilities and lines of the various roads located within the Borough, or serving the Borough. Under such conditions, Moosic cannot properly be called in privity with Scranton or Shapp.[9]

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[7] *Hansberry* v. *Lee*, 311 U. S. 32.

[8] Moosic states in its petition (No. 663 Misc.) that it did not wish to litigate in New York because that court had decided to treat the *Penn-Central Merger Case* and the *N & W Inclusion Case* as "separate proceedings for judicial review purposes," and such an approach would prejudice Moosic "since the adverse impact of *N & W Inclusion* must be considered as an integral part of any judicial review of *PRR–NYC*, and vice versa." Moosic also notes that "the community public interest issues in [its] case . . . are clearly outside the scope of the litigation in the other forums."

[9] In *Hansberry* v. *Lee*, 311 U. S. 32, 43, we stated that even "when the only circumstance defining the class is that the deter-

The Court states that "further judicial review or adjudication of the issues upon which [the New York District Court] passes" is precluded by its decision. But, as I have already pointed out, the New York court did not pass on at least some of the contentions, including the question of the community impact of the *Inclusion Order*, which are raised by the parties in Pennsylvania; nor were those questions even presented to the New York Court for review.

Congress might, of course, channel all complaints against an administrative agency order to a particular court. It has indeed done so in many instances through provisions that a person aggrieved by a certain type

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mination of the rights of its members turns upon a single issue of fact or law," it might be possible for a State constitutionally to adopt a procedure whereby the judgment could be made binding on all members of the class; but only if "the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." This Court in the instant case makes no inquiry, however, whether Moosic can be termed a member of the "same class" as one or more of the parties in the New York court; or whether the issues are "common," and if they are, whether the proceedings have been conducted to ensure their "full and fair consideration."

The Court does not appear to argue that the action in the New York court was a "class action" within Rule 23, Fed. Rules Civ. Proc. Indeed, the court below did not treat it as such, nor make the findings (Rule 23 (a) and (b)) or give the type of notice (Rule 23 (c)) required by that Rule for class actions.

I can find no authority for a rule which would require a party not under the jurisdiction of the inviting court to respond affirmatively to an invitation to intervene or else be bound by an adverse decision. Indeed, *Chase National Bank* v. *Norwalk*, 291 U. S. 431, would suggest that the rule is to the contrary. The Court stated in that case that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.*, at 441.

of order should seek review in a designated court of appeals. 5 U. S. C. § 1031 *et seq.* Where review of an agency order is lodged in a court of appeals and review of the same agency order is also sought in other such courts, the court of appeals where review was first sought is the one to which all other courts are directed to transfer all proceedings with respect to the agency order. 28 U. S. C. § 2112 (a). That has the obvious advantage of centralizing and consolidating judicial review and avoiding conflicts which might obtain if the parties could go to any court that had venue. Congress, however, has made no such provision respecting ICC orders. Section 2112, on which the Court relies, provides in subsection (d) that its provisions are not applicable to review of agency orders in the district courts. ICC orders are reviewable by three-judge district courts. 28 U. S. C. § 1336 (a), § 2325. The general provision for transfer of actions from one district court to another is 28 U. S. C. § 1404 (a). But 28 U. S. C. § 1398 provides, with exceptions not relevant here, that actions challenging ICC orders "shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action." And where the jurisdiction of more than one three-judge district court has been invoked and a motion to transfer the proceedings from one to another has been made, the motion is denied if venue would not have been proper for an original action in the district court to which transfer is sought.[10] When a three-judge district court in New York was asked to transfer proceedings challenging an ICC order to the district court in Maryland, where another like challenge was being made, it declined, say-

[10] Our decisions in *Hoffman* v. *Blaski*, 363 U. S. 335 and *Van Dusen* v. *Barrack*, 376 U. S. 612, indicate that § 1404 (a) permits transfer only to a district court in which the plaintiff would have been entitled, without regard to consent by the defendant, to bring his action originally. Moosic and Scranton could not have brought an original action in New York.

ing, "None of the plaintiffs in the actions in the Southern District of New York has its residence or principal office in the District of Maryland." *New York Central R. Co.* v. *United States*, 200 F. Supp. 944, 947 (D. C. S. D. N. Y. 1961). The New York District Court, speaking through Judge Friendly, refused to invoke the procedure provided for in 28 U. S. C. § 2112 (a), since that section applies, as already noted, only to review of agency orders in the courts of appeal. *Id.*, at 949–950. That court was much more faithful to the system of review, which Congress has provided, than we are today. Moosic and Scranton by no stretch of the imagination have their "residence" in New York. By 28 U. S. C. § 1398 venue plainly lies in Pennsylvania; and Congress has provided no method of transferring those suits to New York.[11]

It is not only hard cases which make bad law. Cases surcharged with the pressure for instant and immediate decision do the same[12] and create precedents which plague us.

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[11] If statutory provisions provide that a person aggrieved must litigate his contentions in a specific federal court, fair notice has been given that if he does not appear and present his claims in the designated court, he will forfeit his right to be heard. But when there is no such statutory provision and when indeed the applicable statute provides for review in the Pennsylvania District Court, the place of residence, is *due process* satisfied when an aggrieved person, who was never a party in the New York court or in privity with any party there, is deprived of a right to be heard on an issue not litigated in that court, simply because he was invited to participate and the United States waived objections? That, I submit, is not a wholly frivolous question.

Nationwide service of process was available to the New York court. 28 U. S. C. § 2321. The United States and the ICC had waived all objections to venue against any party seeking to litigate in New York. But although the United States and the Commission moved successfully in the New York court under Rule 19, Fed. Rules Civ. Proc., to join N & W as an involuntary plaintiff in D & H's action challenging the *Inclusion Order*, they made no effort to join Moosic pursuant to that Rule.

[12] "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping

It seems clear to me that we must permit the parties to litigate in the Pennsylvania court *whether E–L, D & H and B & M should be included in the N & W system.* By no stretch of the imagination can it be argued that the question of the adverse impact on the Pennsylvania communities of the inclusion of the three roads in the N & W system, as now posed by the parties in Pennsylvania, was here for review or was before the New York District Court. See *Erie, Lackawanna R. R. Co.* v. *United States,* — F. Supp. —, — (D. C. S. D. N. Y. 1967).

Last Term we held that the ultimate fate of the three protected roads must be determined before the Penn-Central merger could be consummated. This surely means that judicial review must first be had at least with respect to the contentions which bear on *the basic validity of the inclusion order*—that is, whether the order is in the "public interest," as required by 49 U. S. C. § 5 (2)(d)—as distinguished from collateral questions about the order which need not delay the Penn-Central merger. The basic validity of the inclusion order certainly involves the impact of the inclusion on the communities served by the three lines in question. Whether other questions of like character have survived need not now be determined. It is certain that at least the community-impact issue has not been resolved. And its intimate connection with our holding last Term is evident. For what if it were found that by reason of the impact on the communities the *Inclusion Order* was not in the public interest? Our "protected" roads would then have no home.

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the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." Holmes, J., dissenting, *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401.

The stay order of the Pennsylvania court has expired, and that court is now proceeding with these cases. For purposes of review by this Court, the petitions in Nos. 663 Misc. and 664 Misc., seeking review of the stay order or mandamus to compel the Pennsylvania court to proceed with the cases, can be dismissed. But those petitions did not present to this Court any question concerning the merits of the parties' actions in Pennsylvania; rather they attacked the validity of the order staying their actions in deference to proceedings then being conducted in the New York District Court. And, as already pointed out, at least the question of the community impact of the *Inclusion Order*, which is raised in Pennsylvania, has not been presented either to this Court or the New York District Court for review. I therefore dissent from the Court's holding that all of the parties now litigating in Pennsylvania are precluded from challenging "the Commission's basic findings that the . . . inclusion of the three protected lines in N & W [is] in the public interest." If the Pennsylvania court believes that the allegations of the plaintiffs are substantial, it should be free to enjoin the merger until questions concerning *the basic validity of the Inclusion Order*, at least so far as impact on the Pennsylvania communities is concerned, have been resolved.

SUPREME COURT OF THE UNITED STATES

Nos. 778, 779, 830, 831, 832, 833, 834, 835, AND 836.—
OCTOBER TERM, 1967.

Penn-Central and N & W Inclusion Cases. | On Appeals From the United States District Court for the Southern District of New York.

[January 15, 1968.]

MR. JUSTICE DOUGLAS, dissenting in part.

These cases present at least one serious problem under 49 U. S. C. § 5 (2). Section 5 (2)(a) authorizes two or more carriers to consolidate provided that the Commission finds under subdivision (b) that the "terms and conditions" are "just and reasonable" and "will be consistent with the public interest." Moreover, under subdivision (d) of § 5 (2), the Commission "as a prerequisite to its approval" of the merger may require the inclusion of another railroad in the territory "upon equitable terms."

I do not think the Commission has made those necessary findings under § 5 (2).

The majority opinion adopts a piecemeal approach to judicial review of the Commission's orders, which, as I view it, does not conform with our duty of judicial review in one respect.

In the majority opinion last Term, Mr. Justice Clark noted that "[o]ur experience with other mergers, and common sense as well, indicate that the 'scrambling' goes fast but the unscrambling is interminable and seldom effectively accomplished." *Baltimore & Ohio R. Co.* v. *United States*, 386 U. S. 372, 392. Because of this, we refused to allow the Penn-Central merger to be consummated before the fate of the three protected roads (the Erie-Lackawanna, Delaware & Hudson, and Boston &

Maine) had been determined. Some aspects of the Commission's merger and inclusion orders—those which do not go to the heart of the Commission's decision (that is, its determination that the merger or inclusion is in the "public interest")—can await later judicial review. Examples would be the contentions of Reading and the E–L bondholders. But I fail to see how we can affirm the Commission's decision that this entire transaction is in the "public interest" without considering those points raised by the parties which do go to the heart of the controversy. I refer specifically to the contentions of the parties in the Middle District of Pennsylvania (see my dissent in Nos. 433, 663 Miscellaneous and 664 Miscellaneous), and to Nos. 830 and 831 which involve claims of the New Haven creditor interests, to which I now turn.

Certain bondholder interests of the New York, New Haven & Hartford Railroad Company (New Haven) attack the Commission's failure to provide for actual inclusion of the New Haven into the Penn-Central system as a condition simultaneous with, or precedent to, consummation of the merger. Following the filing of these appeals, the Commission, on November 16, 1967, issued a decision concerning the treatment of the New Haven in the merger plan, styling the opinion as a supplemental order in the Penn-Central merger case. *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, Finance Docket No. 21989. On that date the Commission approved as a first step in the New Haven's reorganization a conveyance of its assets to Penn-Central; it fixed terms for interim financing on the basis of a $25,000,000 loan commitment from Penn-Central; and it provided for the sharing of New Haven's operating losses by Penn-Central, on a sliding scale, pending New Haven's inclusion in the merged system. The Commission also specifically provided that consummation of the

merger would constitute irrevocable assent by Penn-Central to enter into the interim financing arrangement.

The sale agreement proposed by the New Haven trustees provided for New Haven's physical assets and investments to be purchased by Penn-Central free and clear of liens and other encumbrances. The lien of the New Haven creditors' interests would shift from New Haven's present assets to the assets held by the trustees as the proceeds of the sale. Provision for the preservation of priorities and rights of claimants was made in the plan. The trustees originally submitted, pursuant to § 77 of the Bankruptcy Act,[1] a plan of reorganization to be accomplished in two steps. Initially, only the first step, providing for the sale of the New Haven to the merged Penn-Central system, was presented to the Commission for approval. After that part of the plan had been completed, the trustees intended to implement the second step, relating to distributing the assets of the New Haven estate or issuing new New Haven securities.

Certain bondholder interests contested the legality of the two-step plan. But in a decision rendered in May 1967 the Court of Appeals held that a decision on the legality of such a plan would be premature. *In the Matter of the New York, New Haven & Hartford RR. Co.*, 378 F. 2d 635 (C. A. 2d Cir. 1967). In September 1967 the New Haven trustees filed the second part of their plan, but requested the Commission to make immediate findings required under § 5 (2)(d) of the Interstate Commerce Act with respect to the first part of the plan, rather than await completion of the reorganization proceedings. Creditor interests opposed this request by arguing that creditor claims, in the order of priority, would have to be considered by the Commission before it could arrive at "equitable terms" within the meaning of § 5 (2)(d). The Commission chose to adopt the pro-

[1] 11 U. S. C. § 205. See also 49 U. S. C. § 20 (b).

cedure suggested by the trustees, and approved the plan for the sale of assets independently of a complete reorganization plan.

In short, the Commission concluded that an immediate decision on the question under § 5 (2)(d) of "equitable terms" for the sale of assets would satisfy "a legal preliminary to NH inclusion without delay once the Penn-Central merger is consummated." [2] On the other hand, it said, delay of such a decision until completion of New Haven's reorganization would prevent a timely rescue of the New Haven as an operating common carrier. Thus, the Commission opted in favor of "improved service through a consummated Penn-Central merger including an operational NH, while the NH creditors are freed to litigate at will the distribution of their estate." [3]

The bondholder interests before this Court contend that under either the majority or dissenting opinions in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, any sale of the New Haven to the merged Penn-Central system would require at least its submission to a vote of bondholders. See also *Reconstruction Finance Corp. et al.* v. *Denver & Rio Grande Western R. R. Co. et al.*, 328 U. S. 495. The bondholders also argue that the Commission ignored the admonition of this Court in *Palmer* v. *Massachusetts*, 308 U. S. 79, 88, that the powers of the Commission and courts under § 77 of the Bankruptcy Act can properly be exercised only in the context of "a complete plan of reorganization for an insolvent road."

In justifying its action, the Commission noted that except for subsections (b)(1), (4), and (5), of § 77, there is no provision in § 77 that deals specifically with

[2] *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, Finance Docket No. 21989, November 16, 1967 (Slip opinion), at 14.

[3] *Ibid.*

the form or content of a reorganization plan. Therefore, no language of § 77 was believed to prohibit evaluation of the New Haven properties and the approval of their sale before approval of a plan for restructuring the New Haven. The Commission noted the doctrine of "wasting assets" employed under Chapter X of the Bankruptcy Law to permit two-step plans of reorganization, and analogized that doctrine to the instant case—since in the view of the Commission, the New Haven could properly be classified as a "wasting asset." [4]

With respect to interim financing of the New Haven, the Commission approved a loan proposal under which Penn-Central would make available to the New Haven a total of $25,000,000 over three years to enable the New Haven to continue its operations until its assets were conveyed to Penn-Central. The Commission noted that the loan authorization did not impair the jurisdiction of the reorganization court since that court would still have to approve issuance of trustees' certificates to evidence those advances.[5]

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[4] *Id.*, at 112. With respect to the "wasting asset" doctrine in Chapter X proceedings, see, *e. g.*, *In re The Sire Plan, Inc.*, 332 F. 2d 497 (C. A. 2d Cir. 1964); *In re V. Loewer's Gambrinus Brewery Co., Inc.*, 141 F. 2d 747 (C. A. 2d Cir. 1944).

[5] By an order dated December 19, 1967, the reorganization court (U. S. D. C. Conn.) authorized the New Haven Trustees to issue up to $25,000,000 in trustees' certificates to evidence any loans from Penn-Central obtained pursuant to the Commission's November 16, 1967 order. The court ordered that each certificate issued was to constitute an expense of administration equal in priority to other expenses of administration; and that the proceeds derived by the Trustees from the issuance of the certificates could be expended by them for purposes deemed necessary within their discretion (including current maintenance and operation expenses), subject to the supervision of the court. The court provided that the Trustees would not be required to seek any further authorization to make borrowings under the Penn-Central loan agreement; but it directed them to notify the court and the other parties concerned when

The loan provisions approved by the Commission provided further that any time the cash balance of the New Haven fell below $5,000,000, the trustees could borrow from the $25,000,000 commitment enough money to equal a $5,000,000 cash balance plus $2,500,000. The Commission set an interval of at least three months between loan takedowns, and provided that any reduction in the aid which New Haven was receiving from the New England States would reduce correspondingly the amount that could be borrowed from Penn-Central. The interest rate on the loans was declared to be the prime rate of the Morgan Guaranty Trust Company of New York City prevailing at the time the loan is taken down. December 13, 1971, was designated as the maturity date for the trustees' certificates. Finally, the loan provisions would be terminated upon the occurrence of any of the following events: (1) acquisition of the New Haven by Penn-Central; (2) a final and effective order by a regulatory authority or court granting permission to liquidate the New Haven or to dispose of it to someone other than Penn-Central; (3) cessation of the New Haven operation as a going railroad; (4) a determination that Penn-Central shall not acquire the New Haven; (5) the expiration of three years from the date of the Penn-Central merger.

Although the New Haven creditors argued before the Commission that their interests would be reduced by the issuance of the trustees' certificates, which would acquire precedence over their claims against the New Haven estate, the Commission reasoned that:

> "We consider such a result part of the process of distributing the burdens of the NH's operations. It is a fundamental aspect of our free enterprise economy that private persons assume the risks at-

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they intended to take down a loan, and reserved jurisdiction to modify its order with respect to any of these future borrowings.

tached to their investments, and the NH creditors can expect no less because the NH's properties are devoted to a public use. Indeed, the assistance the creditors are receiving from the States and would receive from Penn-Central through the sharing of operating losses would raise some of that burden from their shoulders." [6]

The Commission did not place all of New Haven's operating losses on Penn-Central during the period of the loan agreement. The amount to be absorbed by Penn-Central is governed by a specific formula approved by the Commission.[7] With respect to deciding how much of the loss was to be assumed by Penn-Central under the formula, the Commission noted two main factors: (1) the admonition of the reorganization court that safeguards against endless litigation by New Haven creditors should be established; and (2) in the interim period before conveyance of New Haven's assets to Penn-Central, the opportunities to integrate New Haven's operations into the Penn-Central system would be restricted, so that many operating economies and efficiencies could not be realized until complete inclusion of the New Haven. The Commission felt that the existence of these factors tended to limit the portion of New Haven losses which Penn-Central should have to absorb under the formula. The final amount decided upon was 100% of the loss during the first year, 50% during the second, and 25% during the third. Further, the Commission set $5,500,000 as the maximum Penn-Central share of operating losses in any one year.

Finally, the Commission provided that under the purchase agreement, the trustees' certificates evidencing the loans were to be offset in an amount equal to the operat-

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[6] *Id.*, at 85.

[7] See *id.*, at 104–108.

ing loss absorbed by Penn-Central. The Commission asserted that the burdens on the New Haven creditors caused by the loan-loss absorption agreement would be relatively small—and not significantly different from the burdens under a lease agreement. The Commission expected that the total amount loaned by Penn-Central over three years would probably be "substantially less than $25,000,000." [8] It noted that the requirements for loans would increase in relation to the operating losses of the New Haven; but as the operating losses increased, Penn-Central would absorb a part of the increase. At the same time, the Commission pointed out that since the amount of losses to be assumed by Penn-Central would decline each year (from 100% to 50% to 25%), the creditors would have much to gain by speedily completing the reorganization proceedings.

The bondholder interests attack the operating loss provisions of the Commission's order—contending that Penn-Central should be required to absorb all the operating losses of the New Haven. They also assert that the purchase price approved by the Commission for the sale of New Haven assets to Penn-Central ($125,000,000, being the value of the consideration to be received by the New Haven) is too low. Further, as indicated above, they contend that the Commission is without authority to adopt a two-step reorganization plan which prevents the bondholders from voting on the first aspect of the plan—the sale of assets.

The New Haven trustees argue that the bondholders will have the opportunity to object to these actions of the Commission in the reorganization court and to seek judicial review of its action. Indeed, Oscar Gruss & Son (appellant in No. 830) and the Bondholders' Committee (appellant in No. 831) have indicated that

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[8] *Id.*, at 108.

they intend to seek judicial review of the November 16 order. The trustees also suggest that the questions presented involve only the quantum of consideration to be paid by Penn-Central in implementation of its eventual take-over of the New Haven, and do not merit postponing consummation of the Penn-Central merger.

On the other hand, the bondholders contend that their objections to the Commission's November 16 order are so substantial that even if they have only partial success on judicial review, the feasibility of inclusion would be open to serious question. If inclusion of the New Haven into the Penn-Central system could not be accomplished, a major underpinning in the Commission's finding that the merger was in the public interest would be removed.[9] The New Haven might then have to be liquidated in the reorganization court. Perhaps eventual operation by the Federal Government, or by the States concerned, would be the outcome. In fact, appellant in No. 831 has pending before the reorganization court a petition for immediate liquidation of the New Haven. The bondholders, of course, seek to recover as much of their investment as possible. To the extent that any loans from Penn-Central to the New Haven would not be offset by Penn-Central's obligation to absorb a portion of the New Haven operating losses, the bondholders' equity would be diluted.

The Commission is commanded by § 5 (2)(d) of the Act to authorize inclusion of a road only on "equitable

[9] The Commission authorized the Penn-Central merger, subject to the express condition (Condition No. 8, in Appendix A to its Report and Order dated April 6, 1966, *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, 327 I. C. C. 475, as modified in 328 I. C. C. 304 and 330 I. C. C. 328), that the merged system include the properties and operations of the New Haven. The Commission found that the merger would effectively destroy the ability of the New Haven to survive, and would not be in the public interest without the complete inclusion of the New Haven.

Terms." [10] Are the operating loss provisions, as they now stand, "equitable terms"? The provisions may well constitute a prelude to the slow bleeding or squeezing out of creditor interests, as their equity is diminished by loans.

High finance has a great inventive genius; and one does not have to be sophisticated to see how Penn-Central with the use of this loan device can pick up New Haven for a song.

The Commission has itself stated that the Penn-Central merger would not be in the public interest without the complete inclusion of the New Haven.[11] Clearly we should not approve this merger and decide that the mandate of § 5 (2)(b) has been fulfilled without at the same time concluding that the loan agreement and the sharing of the New Haven deficit are "equitable."

On its face the requirement that Penn-Central share the operating losses of the New Haven on a decreasing scale each year—from 100% to 50% to 25%—seems inequitable. Why a 100–50–25 formula? Why not 100–10–1 or 50–25–10 or 25–50–100? The Commission does not clearly indicate how it arrived at its 100–50–25 formula. Of the two factors mentioned by it in making its determination (preventing endless litigation by New Haven creditors, and the inability to realize many economies during the interim period before the sale of New Haven's assets to Penn-Central), only the first would appear to have any relation to the adoption of a sliding-scale formula.

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[10] 49 U. S. C. § 5 (2)(d). Section 5 (2)(b) authorizes acquisition of one carrier by another on terms which are "just and reasonable." See, *e. g., Schwabacher* v. *United States*, 334 U. S. 182; *Chicago & St. Louis Ry. Co.* v. *Jackson*, 22 F. 2d 509 (C. A. 6th Cir. 1927); *Stott* v. *United States*, 166 F. Supp. 851 (D. C. S. D. N. Y. 1958).

[11] *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, 327 I. C. C. 475, 524.

On its face this formula for sharing of losses seems inherently coercive. It would indeed appear that the Commission sought to force the creditors to accede to its proposal within a year. The pressure would indeed be great; for once the merger between Penn and Central is consummated, the New Haven creditors would have to absorb the losses of the New Haven at an increasing rate if they did not accept the Commission's proposal.

If that is the purpose and effect of this provision concerning Penn-Central's sharing of the operating losses of the New Haven, *the issue may well have spent itself, unless we grant judicial review prior to the consummation of the merger.* Of course, if the merger is approved, one way in which the coercive effect of this provision of the plan could be eliminated would be to undo the merger. But that gets back to the problem of unscrambling mergers of this kind and intricacy, once they are consummated—the difficulty emphasized by Mr. Justice Clark when the case was here before. 386 U. S. 372, 392.

The Court, while not presuming to approve the November 16, 1967, order of the Commission as prescribing "equitable terms" for inclusion, takes the position that the Commission has done all that is required at this point with respect to the inclusion of the New Haven. But I am unable to reconcile this position with the requirements of the statute, which directs in § 5 (2)(d) that a road may be included in another only upon "equitable terms."

The coercive nature of the operating loss provision may well frustrate effective judicial review once the Penn-Central merger is a fact.

On the other hand, if the creditor interests do challenge the Commission's order in the courts, and are successful, inclusion in the Penn-Central system on "equitable terms" at the time of that decision might well be impossible. The Commission itself seemed to recognize the

possibility that the New Haven might not be included in the Penn-Central system in its November 16 report,[12] although it evidently believed that the possibility of non-inclusion did not justify delaying consummation of the Penn-Central merger. Such an approach is not permissible under the statutory scheme, when the Commission has stated that the Penn-Central merger would not be in the public interest, unless the New Haven were included in that merged system. And, as the bondholders have noted, there exists a substantial doubt whether the inclusion of the New Haven on equitable terms as required by § 5 (2)(d) has been provided.

Is such a coercive provision an "equitable" term within the meaning of § 5 (2)(d)? Is "equitable" to be taken to mean what is a "fair" distribution of losses, risks, and burdens between the old creditor interests and the acquiring company? These are old and perennial problems in the reorganization and merger field. They involve a delicate weighing of legal rights and practical realities. How we can approve the merger under the statutory system without determining whether the loan provision and the provision for sharing of losses are "equitable" remains a mystery.

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[12] In its summary of the contingencies upon which the obligation of Penn-Central to loan $25,000,000 to the New Haven would be terminated, the Commission included: "If a regulatory authority or court by a final and effective order grants permission to liquidate the NH or to dispose of it to someone other than Penn-Central"; and "If it should be determined that Penn-Central shall not acquire the NH."